(13)

No. 99-1964-CFX Title: Timothy Booth, Petitioner
v.
C. O. Churner, et al.

Docketed: June 7, 2000 Court: United States Court of Appeals for the Third Circuit

See also:
99-1918

Entry	Date	Proceedings and Orders
	Jun 5 2000	Petition for writ of certiorari filed. (Response due July 7, 2000)
	Jul 7 2000	Brief of respondents C. O. Churner, et al. in opposition filed.
	Jul 19 2000	DISTRIBUTED for Conference of September 25, 2000
	Jul 19 2000	Reply brief of petitioner Timothy Booth filed.
	Aug 22 2000	Record requested.
	Sep 19 2000	Record filed.
	Sep 21 2000	USDC record received.
	Oct 4 2000	REDISTRIBUTED for Conference of October 27, 2000
	Oct 30 2000	Petition GRANTED. SET FOR ARGUMENT March 20, 2001. **********
	Dec 14 2000	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Dec 14 2000	LODGING consisting of twenty spiral bound copies of documents submitted by counsel for amici ACLU, et al.
	Dec 14 2000	Brief amici curiae of Brennan Center for Justice, et al. filed.
	Dec 14 2000	Brief of petitioner Timothy Booth filed.
	Dec 14 2000	Brief amicus curiae of Association of the Bar of the City of New York filed.
	Dec 27 2000	LODGING consisting of ten spiral bound copies of documents submitted by counsel for ACLU, et al.
	Jan 9 2001	Order extending time to file respondents' brief on the mertis to and including January 19, 2001.
	Jan 19 2001	Brief of respondents C. O. Churner, et al. filed.
	Jan 19 2001	Brief amicus curiae of United States filed.
	Jan 19 2001	Brief amici curiae of 50 States and Territories filed.
	Jan 23 2001	LODGING consisting of twenty copies of Inmate Grievance Program materials submitted by counsel for the amici States and Territories.
	Jan 30 2001	CIRCULATED.
	Jan 31 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 20 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 21 2001	Reply brief of petitioner Timothy Booth filed.
	Mar 20 2001	ARGUED.

Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

Timothy Booth,

Petitioner,

v.

C.O. Churner, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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62 pp

QUESTION PRESENTED

1. Whether 42 U.S.C. § 1997e(a), as amended by the Prison Litigation Reform Act, which provides that a prisoner must exhaust "such administrative remedies as are available" before bringing a federal action, requires a prisoner seeking only monetary damages to exhaust administrative remedies where monetary damages are not available under the applicable administrative process.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner is Mr. Timothy Booth, who is currently a prisoner incarcerated at the State Correctional Institute at Graterford in Philadelphia, Pennsylvania. Respondents are Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus and Captain Gardner.

No designation of corporate relationships, pursuant to Supreme Court Rule 29.6, is required in this case.

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Opinion and Order of the United States District Court for the Middle District of Pennsylvania, dismissing Mr. Booth's complaint for failure to exhaust administrative remedies, dated May 30, 1997, *Booth v. Churner*, No. 3:CV-97-0611 (M.D. Pa. 1997) 36a-39a

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PETITION FOR A WRIT OF *CERTIORARI*

This petition presents an important issue of federal statutory interpretation that has created a clear and absolute conflict among the federal courts of appeals. The statute at issue is 42 U.S.C. § 1997e(a), which provides that no prisoner shall bring an action with respect to prison conditions under section 1983 or any other federal law "until such administrative remedies as are available are exhausted."

The issue presented in this petition is whether a prisoner seeking monetary damages under section 1997e(a) must exhaust administrative remedies where, as a matter of law, those remedies cannot provide the monetary damages that the prisoner seeks. Three courts of appeals, drawing on this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), hold that such inevitably futile "exhaustion" is unnecessary. In direct conflict with these decisions, four courts of appeals — including the Third Circuit in this case — hold that a prisoner must undertake such "exhaustion," even where the administrative processes cannot possibly give the prisoner the monetary damages that s/he seeks.

Specifically, in the Fifth, Ninth, and Tenth Circuits, a prisoner seeking monetary damages where monetary damages are not available under the particular state administrative process may proceed directly to federal court. On the other hand, in the Third, Sixth, Seventh, and Eleventh Circuits, a prisoner seeking monetary damages first must avail him or herself of all state administrative processes, regardless whether monetary damages are available under those processes.

Resolution of the conflict among the circuits is important because section 1997e(a) is at issue in virtually all prisoner civil

rights litigation, regulating the balance between state and federal systems and affecting prisoners throughout the country, whether incarcerated in federal or state prison. Without this Court's resolution of the conflict, this issue will continue to confuse and divide the federal courts. Moreover, the conflict has created and will continue to create two different rules about federal involvement in state processes, depending solely on the fortuity of where a prisoner happens to be incarcerated. The statute implicates fundamental issues of comity and federalism with respect to the balance between federal and state systems, thus making the need for a uniform, national rule of law even more compelling. This petition should be granted in order to establish that rule.[1]

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[1] The conflict is widely recognized. *See, e.g., Nyhuis v. Reno*, 204 F.3d 65, 69 (3d Cir. 2000) ("[s]everal courts of appeals have addressed the exhaustion and futility question with which we are faced [and] [t]wo general lines of authority have emerged from these cases"); *Wright v. Hollingsworth*, 201 F.3d 663, 666 n.3 (5th Cir. 2000) (urging the court of appeals to grant *en banc* review of the issue, because it is "a question of exceptional importance," "on which [a] panel decision conflicts with the authoritative decisions of other United States courts of appeals."); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) ("[t]he law concerning the PLRA's exhaustion requirement is in great flux. Several circuits, as well as district courts in this circuit, are split on [the issue of] . . . whether the administrative exhaustion requirement is inapplicable where the relief requested - *i.e.*, strictly monetary damages - is not 'available' through the administrative process."); *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) ("there is a split among the circuits regarding whether a federal prisoner seeking only monetary damages must exhaust administrative remedies"); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999) ("[t]he circuits are in some conflict over

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000), and appears in the Appendix at pages 1a-28a. The opinion of the United States District Court for the Middle District of Pennsylvania dismissing Mr. Booth's complaint pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies has not been officially reported, and appears in the Appendix at pages 36a-39a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on March 7, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1997e(a) (Supp. II 1996) provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

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the issue of whether prisoners must exhaust under the 1996 Act if they seek monetary damages"); *Rumbles v. Hill*, 182 F.3d 1064, 1068 (9th Cir. 1999) (noting that "authorities are split" on issue), *cert. denied*, ___, U.S. ___, 120 S. Ct. 787 (2000).

STATEMENT OF THE CASE

This case arises out of allegations by Timothy Booth, a state prisoner in Pennsylvania, that he was physically assaulted by prison staff on at least four separate occasions while he was confined at the State Correctional Institute at Smithfield in Huntington, Pennsylvania.

The first such assault took place in April of 1996. Mr. Booth alleges that prison staff assaulted him, and that as a result of that assault he suffered an injury to his shoulder. He alleges that his shoulder "slips in and out," and that, despite the recommendation of a prison doctor, he was denied an operation. 4a.

The second assault occurred on February 6, 1997. Mr. Booth alleges that he again was assaulted by one of the officers involved in the first incident. In this altercation, a correctional officer allegedly took Mr. Booth from his cell in handcuffs and threw a cup of cleaning material in his face, after Mr. Booth had thrown water on the officer. 4a-5a.

The third assault of which Mr. Booth complains occurred the following day, on February 7, 1997. Mr. Booth alleges that Lieutenant Rikus shoved Mr. Booth into a storage room shelf, reactivating the shoulder injury, and then left him handcuffed in his cell for half an hour. Specifically, Mr. Booth alleges that, "words [were] exchanged . . . and Lt. Rikus said he should back hand slap me and I said go ahead." He "grabbed my arm and shoved me into the shelf in the storage room." 37a. Mr. Booth alleges that two other officers also were involved in this attack, one of whom pushed Mr. Booth into a door. 5a.

Thereafter, Mr. Booth was relocated to another unit at Smithfield where he allegedly was assaulted for a fourth time, when Officer Churner "uncuffed one hand and asked [Booth] if [he] spit in Officer White's face." 37a. Mr. Booth claims that Churner then punched his face and mouth while Sergeant Workensher and Corrections Officer Kulian watched. 5a. After this assault, Mr. Booth was seen by a doctor who stitched his mouth wounds. 5a.

Mr. Booth sought initial relief on several occasions under the prison's internal grievance procedure. However, he did not fully exhaust the prison administrative remedies because he failed to file any administrative appeals from the prison's denial of his request for relief, as is required under the prison grievance system. 6a. It was undisputed below that Pennsylvania's prisoner grievance procedure did not, during the relevant time, permit the recovery of monetary damages.

On April 21, 1997, Mr. Booth, acting *pro se*, filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania, in which he asserted that he was entitled to both injunctive relief, primarily in the form of a transfer to another prison, and monetary damages. 5a.[2] The district court dismissed Mr. Booth's complaint without prejudice for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) because Mr. Booth failed to avail himself of the appellate process within the prison grievance system after his initial requests for relief were denied. 6a. Mr. Booth appealed.

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[2] Mr. Booth subsequently was transferred to another prison, and thus his claims for injunctive relief became moot.

The Third Circuit Court of Appeals affirmed. Just three weeks earlier, in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), a *Bivens* action brought by a federal prisoner seeking both injunctive relief and monetary damages, the Court of Appeals had held that, "the PLRA amended § 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory — whether or not they provide the inmate-plaintiff with the relief he desires in his federal action." *Nyhuis*, 204 F.3d at 67. In *Booth*, the Court of Appeals adopted the *Nyhuis* rule for state prisoners, concluding that, in view of the federalism interests at stake, "the *Nyhuis* rule has even greater force with respect to § 1983 actions." 23a. The court thus held that, "because Booth failed . . . to exhaust his available administrative remedies (rather than those he believed would be effective) before filing his § 1983 action, the district court appropriately dismissed his action without prejudice." 24a.[3]

REASONS FOR GRANTING THE WRIT

In an address before the American Bar Association on September 7, 1949, Chief Justice Vinson noted that the function of the United States Supreme Court is "to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. . . . Those of you whose petitions for *certiorari* are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients,

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[3] The Court of Appeals also held that an excessive force claim is a claim "with respect to prison conditions" under section 1997e(a). 8a-15a. Mr. Booth does not seek *certiorari* on that issue.

but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, at vi. These words are particularly apt here.

Mr. Booth respectfully requests that this Court resolve the irreconcilable conflict among the circuits with respect to the application of section 1997e(a) in cases where the applicable administrative process cannot possibly provide the monetary damages that the prisoner seeks.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE WHETHER THE PLRA REQUIRES PRISONERS TO EXHAUST ADMINISTRATIVE REMEDIES THAT CANNOT PROVIDE THE MONETARY DAMAGES THAT THE PRISONER SEEKS IS AN IMPORTANT AND RECURRING ISSUE THAT HAS CREATED A CONFLICT AMONG THE CIRCUITS.

As of the time of the filing of this petition, seven courts of appeals had ruled in conflicting ways on the issue whether section 1997e(a) requires a prisoner seeking monetary damages to exhaust administrative remedies that cannot possibly provide the monetary damages sought. The conflicting law among these circuits is set forth below.

The Court of Appeals for the Third Circuit

In the present case in which *certiorari* is sought, the Third Circuit held that section 1997e(a) requires a state prisoner seeking monetary damages to exhaust all prison administrative

remedies, even if those remedies cannot provide the monetary damages that the prisoner seeks. In so holding, the court applied its reasoning from *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), a *Bivens* action brought by a federal prisoner that was decided just three weeks prior to *Booth*, in which the court expressly rejected the futility exception recognized in *Whitley, Lunsford,* and *Garrett* (the Fifth, Ninth, and Tenth Circuit cases discussed below). The court in *Nyhuis* held that the prisoner was required to exhaust administrative remedies, regardless of the fact that he sought monetary damages that the federal prison grievance system did not allow. As the court explained, the PLRA "completely precludes a futility exception to its mandatory exhaustion requirement," and the futility exception "is not applicable in *any* case." *Nyhuis*, 204 F.3d at 71 (emphasis in original).

The Court of Appeals for the Fifth Circuit

The Fifth Circuit holds that section 1997e(a) does not require a prisoner seeking monetary damages to exhaust prison administrative procedures that cannot provide such relief. In *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998), a federal prisoner sought monetary damages for the prison's alleged deliberate indifference to his medical needs. The prisoner had not exhausted internal prison administrative procedures, which, in any event, could not have provided monetary relief.

The court held that the PLRA did not negate this Court's pre-PLRA holding in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that a federal prisoner in a *Bivens* action is not required to pursue administrative remedies that cannot grant the monetary relief that the prisoner seeks. The court reasoned that the plain language of section 1997e(a) did not answer the question whether Congress intended to require a prisoner seeking only

monetary damages to pursue administrative remedies that did not provide for the recovery of monetary damages. Thus, the court held, "*McCarthy*'s holding that Congress did not intend to require exhaustion of unavailable remedies survived the plain language of the amended statute." *Whitley,* 158 F.3d at 886.

The Court of Appeals for the Sixth Circuit

The Sixth Circuit holds that section 1997e(a) requires a prisoner seeking monetary damages to exhaust all prison administrative remedies, even if those remedies cannot provide the monetary damages that the prisoner seeks. In *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999), a state prisoner brought an action under 42 U.S.C. § 1983 against various prison employees seeking only monetary damages, which were not available under the Ohio grievance process. The district court dismissed the complaint for failure to exhaust administrative remedies under section 1997e(a).

The Sixth Circuit affirmed, holding that as long as the prison system has an administrative process that provides review of a prisoner's complaint, the prisoner must exhaust prison remedies even when seeking monetary damages that cannot be obtained. *Freeman*, 196 F.3d at 643. *See also Wolff v. Moore*, 199 F.3d 324, 327 n.3 (6th Cir. 1999); *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999); *Lavista v. Beeler*, 195 F.3d 254, 256-57 (6th Cir. 1999); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999).

However, the court in *Freeman* left open one possibility for the application of the futility doctrine to the PLRA's administrative exhaustion requirement — if the unavailability of monetary damages was a jurisdictional bar that prevented the prison grievance system ever from hearing the case. As the court

explained, "although it may make sense to excuse exhaustion of the prisoner's complaint where the prison system has a flat rule declining jurisdiction over such cases, it does not make sense to excuse the failure to exhaust when the prison system will hear the case and attempt to correct legitimate complaints, even though it will not pay damages." *Freeman*, 196 F.3d at 643. Thus, the Sixth Circuit's rule provides a variation of the rule that exhaustion is necessary even if the monetary damages sought by the prisoner cannot be obtained, and reflects additional discordance among the circuits.

The Court of Appeals for the Seventh Circuit

The Seventh Circuit holds that section 1997e(a) requires a prisoner seeking monetary damages to exhaust all prison administrative remedies, even if those remedies cannot provide the monetary damages that the prisoner seeks. In *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999), a state prisoner sought monetary damages as a result of improper medical treatment. The Seventh Circuit rejected the prisoner's argument that no administrative remedies were "available" because he wanted only monetary damages, which Wisconsin's administrative process could not provide. The court concluded that as long as some remedies were available from the prison administrative process, the prisoner had to exhaust that process. Otherwise, the exhaustion requirement would be limited to cases in which the prisoner could obtain his or her preferred remedy from the administrative process. *Perez*, 182 F.3d at 537; *see also Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999) (reaffirming the holding of *Perez* that there is no futility exception to PLRA's exhaustion requirement).

Like the Sixth Circuit, the Seventh Circuit in *Perez* conjectured a possible exception to its rule — but not the same

exception proposed by the Sixth Circuit. According to the Seventh Circuit, "[i]t is possible to imagine cases in which the harm is done and no further administrative action could supply *any* 'remedy.'... If the injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation, then there is no administrative remedy to exhaust." *Perez,* 182 F.3d at 538 (emphasis in original). This pattern of not only conflicting rules among the circuits, but also variations even among those circuits that appear to agree on the general rule, is an additional reason why this Court should resolve the conflict and propound a uniform, national rule.

The Court of Appeals for the Ninth Circuit

The Ninth Circuit holds that section 1997e(a) does not require a prisoner seeking monetary damages to exhaust prison administrative remedies that cannot provide such relief. In *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998), a federal prisoner brought a *Bivens* action seeking only monetary damages. The court held that the prisoner "was . . . not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the Administrative Remedy Program only provides for injunctive relief." *Lunsford*, 155 F.3d at 1179.

In *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 787 (2000), the court applied its holding in *Lunsford* to a state prisoner in a section 1983 action, holding that, "[e]xhaustion of administrative remedies under section 1997e(a) is not required if a prisoner's section 1983 claim seeks only monetary damages and if the correctional facility's administrative grievance process does not allow for such an award." *Rumbles*, 182 F.3d at 1069.

The Court of Appeals for the Tenth Circuit

The Tenth Circuit holds that section 1997e(a) does not require a prisoner seeking monetary damages to exhaust prison administrative remedies that cannot provide such relief. In *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997), a federal prisoner seeking monetary damages brought a *Bivens* action against corrections officials, alleging excessive force and deliberate indifference to his medical needs. The district court dismissed the claim under section 1997e(a) for failure to exhaust prison administrative remedies. The Tenth Circuit reversed.

Like the Fifth Circuit in *Whitley*, the Tenth Circuit looked to legislative history and Supreme Court precedent to conclude that the PLRA does not require exhaustion of administrative remedies where the monetary damages that the prisoner seeks cannot be obtained through the administrative process. The court explained that the PLRA did not nullify the basic holding of *McCarthy* that a prisoner need not exhaust futile administrative remedies. *Garrett*, 127 F.3d at 1267 ("[U]ntil an administrative remedy is provided for *Bivens* claims for monetary damages, we must conclude that no exhaustion of administrative remedies is required under PLRA in this case because no such remedies exist to be exhausted."). *See also Basham v. Uphoff*, No. 98-8013, 1998 U.S. App. LEXIS 30999, at *6-9 (10th Cir. Dec. 8, 1998) (state prisoner need exhaust only administrative remedies that are "actually available").

The Court of Appeals for the Eleventh Circuit

The Eleventh Circuit holds that section 1997e(a) requires a prisoner seeking monetary damages to exhaust all prison administrative remedies, even if those remedies cannot provide the monetary damages that the prisoner seeks. In *Alexander v.*

Hawk, 159 F.3d 1321 (11th Cir. 1998), a federal prisoner brought a *Bivens* action against prison officials claiming that enforcement of federal legislation restricting prisoners' access to sexually explicit magazines violated his First Amendment rights. The prisoner argued that he should be excused from failing to exhaust the Federal Bureau of Prisons' administrative remedies because the Bureau had no authority to award the monetary damages he was seeking or to declare the federal legislation unconstitutional. *Alexander*, 159 F.3d at 1325.

The court of appeals held that, "the judicially recognized futility and inadequacy exceptions do not survive the new mandatory exhaustion requirement of the PLRA." *Id.* The court based its conclusion largely on the fact that the pre-PLRA version of the statute required "exhaustion of such plain, speedy and effective remedies as are available," whereas the amended version requires the exhaustion of "such administrative remedies as are available." The court reasoned that the elimination of the phrase "plain, speedy and effective" signified that "Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy is 'available' in the prison involved." *Alexander*, 159 F.3d at 1326. *See also Miller v. Tanner*, 196 F.3d 1190, 1193 (11th Cir. 1999) (court will not review effectiveness of remedies, only whether such remedies were available); *Harris v. Garner*, 190 F.3d 1279, 1285-86 (11th Cir. 1999) (state prisoners required to exhaust all administrative remedies before bringing action under federal law, even if such exhaustion would be futile).[4]

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[4] The D.C., First, Second, Fourth, and Eighth Circuits have yet to rule on the issue presented. Many district courts in those circuits have shown a tendency to require exhaustion, but routinely have commented on the confusion and conflict

CONCLUSION

An analysis of the case law interpreting section 1997e(a) reveals a significant split among the courts of appeals. Three circuits — the Fifth, Ninth, and Tenth — hold that where a prisoner seeks monetary relief and the administrative remedies cannot provide the monetary relief sought, section 1997e(a) does not require exhaustion. Conversely, four circuits — the Third, Sixth, Seventh, and Eleventh — reach precisely the opposite conclusion, requiring prisoners who seek only monetary relief to exhaust administrative procedures, even where those procedures cannot provide monetary relief. And two of those circuits contemplate possible, but different, exceptions to the general rule.

This issue is deserving of this Court's review because it involves the interpretation of a federal statute at issue in virtually all prisoner civil rights litigation, which seeks to achieve a balance between federal and state relations. As to such an issue,

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regarding this issue. *See, e.g., Feliciano v. Servicios Correccionales*, 79 F. Supp. 2d 31, 33 (D.P.R. 2000) (acknowledging the sharp split among the circuit courts); *Langford v. Couch*, 50 F. Supp. 2d 544, 546-47 (E.D. Va. 1999) ("Authority from other circuits on this question is split. . . . District courts, too, are divided on this question. These unharmonious results stem from sharply differing views of § 1997e(a), its language and its underlying policy and purpose."); *Sallee v. Joyner*, 40 F. Supp. 2d 766, 769 (E.D. Va. 1999) ("many courts have not agreed on whether the PLRA requires inmates to grieve their claims for monetary damages through the institutional grievance process"); *Smith v. Stubblefield*, 30 F. Supp. 2d 1168, 1172 (E.D. Mo. 1998) ("there is no consensus among the courts that have considered this issue").

the current state of disparate rules throughout the country is intolerable. This Court should grant *certiorari* in order to establish a uniform, national rule on this important issue.

For these reasons, petitioner Timothy Booth respectfully requests that this Court grant his petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: June 5, 2000.

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In The

Supreme Court of the United States

Timothy Booth,

Petitioner,

v.

C.O. Churner, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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APPENDIX TO PETITION FOR A WRIT OF *CERTIORARI*

TIMOTHY BOOTH, Appellant

v.

CHURNER, C.O.; Workensher, Sgt.;
Rikus, Lt.; W. Gardner, Capt.

Nos. 97-7487, 97-7488

United States Court of Appeals,
Third Circuit

Argued: Sept. 27, 1999

Filed: March 7, 2000

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D. Michael Fisher, Attorney
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(Argued), Senior Deputy Attorney General, John G. Knorr, III,
Chief Deputy Attorney General,
Office of Attorney General, Harrisburg, PA, for Appellees.

Before: BECKER, Chief Judge,
McKEE, and NOONAN,*
Circuit Judges.

*Honorable John T. Noonan, Jr., Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION OF THE COURT

BECKER, Chief Judge.

This appeal by Timothy Booth from an order of the District Court dismissing his prisoner's civil rights action presents two important questions about the meaning of the mandatory administrative exhaustion requirement in the Prison Litigation Reform Act of 1996 (the PLRA). Booth alleges that while he was confined in the Commonwealth of Pennsylvania's State Correctional Institute at Smithfield, several prison guards, on several occasions, punched him in the face, threw cleaning material in his face, shoved him into a shelf, and tightened and twisted his handcuffs in such a manner as to injure him. Asserting his Eighth Amendment right to be free of cruel and unusual punishment, Booth, acting pro se, brought this 42 U.S.C. § 1983 excessive force action in the District Court for the Middle District of Pennsylvania, requesting various forms of monetary and injunctive relief. He did so without first exhausting the administrative remedies available to him at Smithfield. Because of this failure to exhaust his administrative remedies, the District Court dismissed his action pursuant to 42 U.S.C. § 1997e(a).

As amended by the PLRA, § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (amended by Pub.L. 104-134, Title I, § 101(a), 110 Stat. 1321-71 (1996). The first question raised by Booth's appeal concerns the applicability of § 1997e(a) to § 1983 excessive force actions; i.e., whether excessive force is a "prison condition" for purposes of the PLRA. This important and difficult question is a matter of first impression for this court. Booth contends that § 1997e(a) "action ... with respect to prison

conditions" language applies only to complaints about the physical conditions in prisons, and does not apply to his § 1983 excessive force action. Therefore, he concludes, the District Court erred in analyzing his action under § 1997e(a). We reject this argument and hold that § 1997e(a) applies to excessive force actions. We base this decision on the plain meaning of the language of the PLRA, case law from our sister circuits, and recent Supreme Court precedent interpreting similar prisoner litigation legislation.

The second question raised by Booth's appeal has to do with the application of § 1997e(a)'s exhaustion requirement. Booth argues that even if § 1997e(a) applies to his action, exhaustion would have been futile, because the available administrative process could not provide him with the monetary relief he seeks. Accordingly, he contends, his failure to exhaust such procedures is not mandated by § 1997e(a), which only requires the exhaustion of administrative remedies "as are available."

Our recent decision in *Nyhuis v. Reno,* 204 F.3d 65, 78 (3d Cir. 2000), rejected this argument. *Nyhuis* was a *Bivens* action brought by a federal inmate, in which we held that "the PLRA amended § 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory—whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." *Id.* at 67. The reasoning of *Nyhuis* applies equally in the § 1983 context, as § 1997e(a) treats *Bivens* actions and § 1983 actions as functional equivalents. *Nyhuis* is therefore controlling in this case.

Accordingly, even though this is an excessive force action, and even though the Commonwealth of Pennsylvania's inmate grievance process could not provide Booth with the money damages he sought, we hold that Booth was required by

§ 1997e(a) to exhaust the administrative remedies available to him prior to filing this action. Because he admittedly has not done so, we will affirm the judgment of the District Court.[1]

I.

On April 21, 1997, Booth began this action in the District Court, using a form provided by the court to prisoners filing pro se complaints under 42 U.S.C. § 1983. He names Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain W. Gardner as defendants. He stated that he had presented the facts of the case in the state prisoner grievance procedure and that his allegations were "dismissed or covered up." He added, "There isn't any help because of retaliation because I spoke up about abuse and corruption." In the space provided for "Parties" he added Superintendent Morgan to the list of defendants. In the space labeled "Statement of Claim" he wrote nothing. In the space labeled "Relief" he asked both for a "preliminary injunction," and for a "protection order for transfer to another prison as my safety and life is at stake."

In a handwritten document filed with his form complaint, Booth alleged the following facts, which gave rise to his § 1983 action. He first complained that, in April 1996, he had been "assaulted by a Sgt. Robinson and a C/O named Thomas. . ." As a result of that assault, he alleges, he has "a shoulder that slips in and out." Subsequent to that incident, he contends, he was denied an operation on his shoulder with "deliberate indifference to [his] shoulder and back." Booth next averred that on February 6, 1997, he threw water on Corrections Officer Thomas, who

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[1] We express our appreciation to Nancy Winkelman, Esquire, who, acting pro bono at the request of the court, represented Mr. Booth both ably and zealously.

then took him to a storage room and threw a cup of cleaning material in his face.

Booth further claimed that on February 7, 1997, after an exchange of words with Lieutenant Rikus, Rikus shoved him into the shelf in the storage room and Thomas pushed him into a door, while Sergeant White looked on. He alleges that shortly thereafter he was taken back to his cell, where Thomas tightened and twisted his handcuffs in such a way that bruised his wrists. Booth last complained that, on March 23, 1997, Corrections Officer Churner punched him in the face and mouth, while Sergeant Workensher and Corrections Officer Kulian watched. As a result, he contends, his mouth "was busted open" and he received three stitches. Booth ended this narrative, "I need out of this jail before they kill me. And I want each and every officer to be punished for assaulting me. Please, I'm in fear of my life."

In a document dated May 19, 1997, he petitioned "To Show Cause for Appointment of Counsel, To Keep Top Officials as Defendants, Amending Relief Plaintiff Seeks." In this petition, he asked for "an injunction to stop the continuous beating," an order "to get operation," a transfer to another prison, and "money damages $750,000 (permanent damages)." In later paragraphs, he again asked for an injunction, a transfer, and for money damages in different amounts; he also asked for an order to improve the prison law library and to fine prison officials for contempt of court, for an order to hire paralegal assistance for himself, and for "money damages $300,000." In "Plaintiff's Amendment to Specific Relief," filed the next day, he asked for a protective order to be transferred to another jail, appointment of counsel, a pretrial hearing, a disclosure order for prison records, and $400,000 for "nominal, punitive, exemplary, and compensatory" damages.

The District Court, acting *sua sponte* and without requiring an answer from the Defendants, dismissed Booth's action without prejudice on May 30, 1997, as it had the power to do under 42 U.S.C. § 1997e(c). The rationale for the Court's order was that Booth had failed to exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e(a) before filing his § 1983 action. The Court observed that at the time Booth filed his action the Pennsylvania Department of Corrections had a three-step grievance procedure. Booth had taken the first step in the process but made no showing that he had taken the second and third steps, which required that he appeal the decision reached by the prison officials in the first step.[2] The court

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[2] The Commonwealth of Pennsylvania's Department of Corrections Consolidated Inmate Grievance System consists of a three-part administrative process. Grievances must be submitted, in writing, for initial review to the Facility/Regional Grievance Coordinator, within fifteen days after the events upon which the claims are based. *See* Commonwealth of Pennsylvania, Department of Corrections, Consolidated Income Grievance Review System, Policy No. DC-ADM 804 §§ VI.A.1, VI.B.2. (Oct. 20, 1994). Extensions of this time period may be granted for good cause. *See id.* § VI.B.2.

The procedures for filing such a claim are straightforward. Once submitted, the grievance is investigated and persons having personal knowledge of the subject matter may be interviewed. *See id.* § VI.B.3. If the grievant requests a personal interview, the policy provides that one "shall" be granted. *Id.* Within ten working days of receipt of the grievance by the Grievance Officer, the policy provides that "the grievant shall be provided a written response to the grievance to include a brief rationale, summarizing the conclusions and any actions taken or recommended to resolve the issues raised by the grievance." *Id.* § VI.B.2.

Within five days of the receipt of this initial determination, the grievant may appeal the determination to the appropriate intermediate review personnel. *See id.* §§ VI.C.1, 2. The intermediate review

concluded that as Booth has not exhausted his available remedies, dismissal was required by § 1997e(a). In reaching this conclusion, the District Court assumed, without discussion, that Booth's excessive force action was governed by § 1997e(a).

On June 9, 1997, Booth moved for reconsideration of this order. On July 3, the District Court denied this motion. Booth moved to amend his complaint, and on July 17, 1997, this motion was "dismissed as moot, as plaintiff's case was closed on May 30, 1997." Booth thereafter appealed. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.[3]

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personnel have ten working days after the receipt of the appeal to notify the grievant of their decision. *See id.* § VI.C.4. "This decision may consist of approval, disapproval, modification, reversal, remand or reassignment for further fact finding, and must include a brief statement of the reasons for the decision." *Id.* In the third, and final, step of the process, "[a]ny inmate who is dissatisfied with the disposition of an Appeal from an Initial Review decision; may, within seven (7) days of receiving the decision, appeal [to the Central Office Review Committee (the CORC)]. . .for final review." *Id.* § VI.D.1. Absent good cause, final review is not permitted if a grievant has not complied with the procedures governing Initial Review and Appeal from Initial Review. *See id.* § VI.D.2. On final review, the CORC (1) has the power to require additional investigation before it makes its determination, *see id.* § VI.D.5; (2) may consider matters related to the initial grievance, *see id.* § VI.D.7. The CORC must issue its decision within twenty-one days after receipt of an appeal, and it must include a brief statement of the reasons for the decision it reaches. *See id.* As noted above, Booth concedes that he did not avail himself of either the intermediate or final review process.

[3] The District Court dismissed Booth's § 1983 claim *without* prejudice. To be appealable under 28 U.S.C. § 1291, an order of dismissal must ordinarily be with prejudice. *See, e.g., Bhalta v. U.S. Capital Corp.*, 990 F.2d 780 (3d Cir. 1993). In *Garber v. Lego*, 11

II.

We first examine whether the words "action . . . with respect to prison conditions" in § 1997e(a) were intended to apply to excessive force actions such as Booth's. Section 1997e(a) provides that

> *[n]o action shall be brought with respect to prison conditions* under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (emphasis added). Booth argues that his § 1983 excessive force action is not governed by § 1997e(a)for three reasons. First, he contends that the words "prison conditions" simply cannot be read to include a prison guard's intentional act of violence. Second, he argues that, when one reads the PLRA and its legislative history as a whole, there is no basis to conclude that § 1997e(a) was meant to reference claims of excessive force. Third, Booth points to two recent Supreme

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F.3d 1197, 1198 n. 1 (3d Cir. 1993), we recognized an exception to that general rule. We noted that a plaintiff can appeal from a dismissal without prejudice when he declares his intention to stand on his complaint or when he cannot cure the defect in his complaint. *See id.*; *see also, Bethel v. McAllister Bros., Inc.*, 81 F.3d 376, 381 (3d Cir. 1996) (recognizing the same exceptions); (*Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874, 878 (3d Cir. 1990) (same). These two conjunctive preconditions are clearly met in this case. In briefing this issue and at oral argument, Booth's counsel stated that Booth had elected "to stand on his complaint without amendment." Additionally, both parties agree that the time is long past for Booth to pursue his normal administrative remedies; therefore, he cannot cure the defect in his complaint on which the District Court based its dismissal.

Court cases, in which the Court has drawn a line between excessive force actions, which involve intentional acts of violence, and conditions-of-confinement actions, which do not. Booth submits that, in enacting the PLRA, Congress evinced no intent to disturb this distinction when it employed the "prison conditions" language it did in § 1997e(a). We take up these arguments in turn.

A.

We would normally begin our analysis of § 1997e(a) by looking to the plain meaning of the words "action . . . with respect prison conditions" that Congress employed in drafting that section. Congress, however, defined the term "civil action with respect to prison conditions" in another section of the PLRA, 18 U.S.C. § 3626(g)(2), and thus spared us from that inquiry, *see Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999) (holding that "the scope of § 1997e(a)'s exhaustion requirement is determined by the definition of a 'civil action with respect to prison conditions' as set forth in § 3626(g)(2)").

To borrow from the Supreme Court in *Sullivan v. Stroop*, "[t]he substantial relation between the two [provisions in the PLRA] presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L.Ed. 2d 438 (1990) (citations and internal quotations omitted). The PLRA not only amended 42 U.S.C. § 1997e to include various limitations on actions such as the mandatory exhaustion requirement in §1997e(a), it also created 18 U.S.C. § 3626, which in many subsections, prevents federal courts from ordering broad prospective relief in "any civil action with respect to prison conditions." Like § 1997e, § 3626 curbs the extent to which federal prison litigation interferes with the states' and the federal

government's administration of their own prisons. Because these two sections of the PLRA are directed toward similar ends and are thus substantially related, it follows from the canon of interpretation invoked in *Stroop* that the identical terms used in the two sections should be read as conveying the same meaning.

See Freeman, 196 F.3d at 644.

Section 3626(g)(2) provides that the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (emphasis added).

As a matter of common sense, we understand the "conditions of confinement" language *preceding* the "or" to include complaints such as those regarding cell overcrowding, poor prison construction, inadequate medical facilities, and incomplete law libraries. Put differently, actions arising under this clause relate to the environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein. Booth's allegations that prison guards used excessive force against him do not naturally fall into this class of actions.

Booth's action does, however, fit neatly into the language in § 3626(g)(2) *following* the "or," which refers to any civil action with respect to the "effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2). We read this clause to refer to civil actions ranging from excessive force actions, such as Booth's, to actions "with

respect to" a prison official's decision not to make basic repairs to the prison, or intentionally to deny a prisoner food, heating or medical attention. All of these actions affect the lives of prisoners similarly: They make their lives worse.

B.

This common sense reading of the language in § 3626(g)(2) comports with the manner in which the Supreme Court has read similar language in statutes dealing with prison litigation. In *McCarthy v. Bronson*, 500 U.S. 136, 137, 111 S. Ct. 1737, 114 L.Ed.2d 194 (1991), the Court was faced with a similar provision in a prison litigation statute, 28 U.S.C. § 636(b)(1)(B), which authorized the nonconsensual reference to magistrate judges of "prisoner petitions challenging conditions of confinement." In ruling on the scope of § 636(b)(1)(B), the unanimous Court interpreted the section's "conditions of confinement" language–one half of the definition of "prison conditions" in § 3626(g)(2)–to include all inmate petitions, not only those regarding "continuous conditions," but "isolated episodes of unconstitutional conduct," such as the petitioner's claim of excessive force, as well. *McCarthy*, 500 U.S. at 139, 111 S. Ct. 1737. In reaching this conclusion, the Court wrote:

> We do not quarrel with petitioner's claim that the most natural reading of the phrase "challenging conditions of confinement," when viewed in isolation, would *not* include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context. . . .
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> The text of the statute does not define the term "conditions of confinement" or contain any language suggesting that prisoner petitions

> should be divided into subcategories. On the contrary, when the relevant section is read in its entirety, it suggests that Congress intended to authorize the nonconsensual reference to *all prisoner petitions* to a magistrate.

Id. at 139, 111 S. Ct. 1737 (citations omitted) (emphasis added).

As compared to the statute in *McCarthy*, Congress in the PLRA, made its intent to subject all prisoner actions (save for habeas petitions) to § 1997e(a)'s exhaustion requirements even more clear. It did so by employing the language it did in § 3626(g)(2). In §3626(g)(2), Congress included both the "conditions of confinement" language, which was enough in *McCarthy* to encompass all prison petitions, and the "effects of actions by government officials" language, which, on natural reading, more closely refers to isolated episodes of unconstitutional conduct at the hands of prison officials–such as the instances of unconstitutional excessive force alleged in the case at bar. The addition of the language in § 3626(g)(2) avoids the plain meaning problem with the statute at issue in *McCarthy*, and it clarifies Congress's intent to subject all inmate actions to the PLRA's exhaustion requirement.

The content of the PLRA supports this conclusion. The PLRA was plainly intended, at least in part, to "reduce the intervention of federal courts into the management of the nation's prison systems." *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999). Congress would only undermine this objective by carving out certain types of actions from the aegis of the PLRA. Therefore, we believe that the expansive and somewhat overlapping language Congress employed in § 3626(g)(2) must be read—naturally and in its proper context—to encompass all prisoner petitions.

The only court of appeals explicitly to address the question agrees with our conclusion. Relying on *McCarthy* and the definition of "action with respect to prison conditions" in § 3626(g)(2), the Court of Appeals for the Sixth Circuit recently held "that the term 'prison conditions' as used in § 1997e includes claims of excessive force. . . ." *Freeman*, 196 F.3d at 644. The Courts of Appeals for the Fifth and Tenth Circuits have implicitly reached the same conclusion—that excessive force actions are "prison conditions" actions and subject to the exhaustion requirements set forth in § 1997e(a)—without discussing the precise argument raised by Booth and adopted by the dissent. *See Wendell v. Asher*, 162 F.3d 887, 889, 891-92 (5th Cir. 1998) (applying § 1997e(a)'s exhaustion requirement to inmate-plaintiff's excessive force claim); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997) (same).[4] In the margin, we

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[4] The other courts of appeals that have been presented with the issue have declined to resolve it for different reasons. *See Miller v. Tanner*, 196 F.3d 1190, 1191 n. 1 (11th Cir. 1999) (declining to resolve the issue in light of the fact that the court disposed of the appeal on other grounds); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (recognizing that the law concerning the PLRA's "action... with respect to prison conditions" language was in flux, but refusing to resolve the question "without the benefit of a more complete record"); *Rumbles v. Hill*, 182 F.3d 1064, 1066 n. 2 (9th Cir. 1999) (declining to address the issue because "it was not raised below"). District courts are split on the issue. Those holding that excessive force actions fall under § 1997e(a) include the District Court in the present appeal, *Beason v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884 (S.D.N.Y.1998) (Mukasey J.), and *Johnson v. Garraghty*, 57 F. Supp. 2d 321 (E.D. Va. 1999) (Ellis, J.) These courts rely on *McCarthy* and the definition of "action with respect to prison conditions" in § 3626(g)(2) to support their holding. District courts holding to the contrary include *White v. Fauver*, 19 F. Supp. 2d 305 (D.N.J. 1998) (Orlofsky, J.), and *Carter v. Kiernan*, No. 98 Civ. 2664(JGK), 1999 WL 14014 (S.D.N.Y. Jan 14, 1999) (Koeltl, J.).

respond, in part, to the dissent's adoption of Booth's position.[5]

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[5] Without addressing *McCarthy*, except to mention our reliance on it, the dissent advances plain meaning and legislative history arguments to support its position. The dissent parses the phrase "prison conditions" in § 1997e(a)-looking to its definition in *Webster's* and in 28 U.S.C. § 3626(g)(2)-and concludes that the phrase does not encompass claims of excessive force. As do we in addressing § 3626(g)(2)'s definition, the dissent divides the section's language into its two components. It opines that the "statutory phrase 'conditions of confinement' [in § 3626(g)(2)] do[es] not encompass specific batteries." Dissent at 301. As noted above, we take no exception to the dissent's understanding of this clause. *See supra* Section II.A. If Congress had only used the "conditions of confinement" language in § 3626(g)(2), we would be forced, as was the Court in *McCarthy*, 500 U.S. at 139-44, 111 S. Ct. 1737, to query whether this language was employed in the context of the statute to connote something other than its most natural meaning. *See supra* Section II.B. (the dissent engages in this "contextual" analysis of the PLRA, but for reasons explained in note 9, *infra*, we are unconvinced by its reading.)

Addressing the second half of the definition provided in § 3626(g)(2), the dissent continues: "A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution." Dissent at 302. Relying on what it concedes are "[s]nippets of legislative history," *id.* the dissent concludes that the statutory phrase "effects of actions by government officials on the lives of persons confined in prisons," 28 U.S.C. § 3626(g)(2), was intended to refer only to actions by prison officials such as "[the delivery of] lukewarm food; ... employ[ing] unlicensed barbers; ... admit[ting] more prisoners than the prison was designed for; ... decid[ing] to provide creamy peanut butter instead of chunky; ... decid[ing] not to offer salad bars or weekend brunches; [or] ... decid[ing] to play classical music on the prison stereo system"-*not* a punch in the jaw or a blow to the body. *Id.* at 301-302 (citing 141 Cong. Rec. S14611-01, S14627 (Sept. 29, 1995)).

C.

Booth attempts to buttress his reading of § 1997e(a) by pointing to Supreme Court precedent that has drawn a distinction between excessive force claims and prison condition claims. When pressed by logic, however, this argument proves as brittle as the analysis it was erected to support.

A familiar maxim of statutory construction provides that "'[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S. Ct. 2789, 69 L.Ed.2d 672 (1981)). Invoking this maxim, Booth cites two recent Supreme Court cases in which the Court distinguished between conditions-of-confinement claims and excessive force claims, and treated the two types of claims differently. *See Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994); *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.

We find this reading of the second half of § 3626(g)(2) unconvincing. For us as for the court in *Freeman*, 196 F.3d at 644, the phrase naturally references isolated acts taken by prison officials that affect prisoners' rights, including alleged acts of excessive force, *see supra* Section II.A. If one were to accept the dissent's narrower reading of § 3626(g)(2), the two clauses employed in § 3626(g)(2) would be narrower than the lone "conditions of confinement" clause employed by Congress in *McCarthy*, 500 U.S. at 139-44, 111 S. Ct. 1737. *See supra* Section II.B. (discussing *McCarthy*). The claim that the addition of the "effects of acts of government officials" clause renders the scope of § 3626(g)(2) narrower than the provision at issue in *McCarthy* is unconvincing, especially when the additional clause in § 3626(g)(2) clearly broadens the scope of the section.

Ct. 995, 117 L.Ed.2d 156 (1992).[6] From the distinction drawn by the Court in *Farmer* and *Hudson*, Booth reasons that if Congress intended to eliminate that distinction in § 1997e(a) between excessive force and prison condition claims it would have made its intentions explicit.

There are four things wrong with this argument. First, and most obvious, Congress made its intentions clear regarding what "actions with respect to prison conditions" meant in § 1997e(a), by defining that term expressly and expansively in § 3626(g)(2). Congress's explicit language in the PLRA, therefore, obviates the need to resort to the maxim. *See NLRB*, 453 U.S. at 329, 101 S. Ct. 2789.

Second, if we were to ignore the import of § 3626(g)(2)'s definition and apply the maxim based on language in *Farmer* and *Hudson*, we would ignore the difference in the nature of the power allocated to the courts and Congress in our tripartite federal system. As Judge Mukasey noted in his forceful opinion in *Beeson v. Fishkill Correctional Facility*, which held that § 1997e(a) applied to excessive force claims, "a court's responsibility in reading § 1997e is to determine the intent of Congress when it referred to 'prison conditions' in the statute, not the intent of the Supreme Court when it used a similar, but not identical, term in a case decided before the statute was passed."

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[6] In *Hudson*, 503 U.S. at 9, 112 S. Ct. 995, the Supreme Court distinguished the "extreme deprivations" that are necessary to make out a "conditions-of-confinement claim" from the lesser showing necessary to make out an excessive force claim. In *Farmer*, 511 U.S. at 835-36, 114 S. Ct. 1970, the Court again relied upon this distinction to hold that the mental state necessary to make out an excessive force claim was lesser than the showing required to establish a conditions-of-confinement claim.

28 F. Supp. 2d 884, 890 (S.D.N.Y. 1998) (referring to *Farmer* and *Hudson*).

Third, there is no evidence, other than the Court's use of similar language in *Farmer* and in *Hudson*, that the term "prison conditions" has a well-settled meaning, firmly established in the annals of the common law. In fact, *Farmer* and *Hudson* refer to "conditions of confinement" claims, not "prison conditions" claims.[7] The difference between the terms of art invoked in *Farmer* and *Hudson* and in this case makes resort to maxim even more unreliable.

Fourth, as evidenced by the Supreme Court's opinion in *McCarthy*, the phrase "conditions of confinement," which Booth would have us equate with the phrase "prison conditions," is not so commonly understood. In *McCarthy*—which was decided near the time that *Farmer* and *Hudson* were, but prior to the PLRA's enactment—the Supreme Court had to interpret the phrase "petitions challenging conditions of confinement" in 28 U.S.C. § 636(b)(1)(B). As noted above, the Court read the phrase to include challenges not only to ongoing prison conditions, but also to isolated episodes of allegedly unconstitutional conduct by prison officials, such as assault. *See id.* at 141-43, 111 S. Ct. 1737. Judge Mukasey put it well in *Beeson* when he

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[7] In *Hudson*, the Court wrote, "[E]xtreme deprivations are required to make out a *conditions-of-confinement* claim.... In the *excessive force* context, society's expectations are different." 503 U.S. at 9, 112 S. Ct. 995 (emphasis added). In *Farmer*, the Court wrote, "In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example use *excessive physical force* against prisoners. The Amendment also imposes duties on these officials, who must provide humane *conditions of confinement*...." 511 U.S. at 832, 114 S. Ct. 1970 (citation omitted) (emphasis added).

wrote, "the Court [in *McCarthy*] made absolutely no mention of the supposedly familiar distinction between excessive force claims and conditions of confinement claims, despite effectively being presented with the issue squarely." 28 F. Supp. 2d at 891 (citation omitted). The fact that the terms "prison conditions" and "conditions of confinement" seem to have different meanings in different contexts again makes invocation of the maxim of interpretation inappropriate.

With *Farmer* and *Hudson* cast in their proper light, we are confident in holding that § 1997e(a)'s exhaustion requirement does apply to excessive force claims.[8] As we hold that Booth's § 1983 excessive force action is governed by § 1997e(a), we turn our attention to whether § 1997e(a)'s exhaustion requirement bars it. Before doing so, we address (in the margin) another argument advanced by the dissent in support of Booth's reading of the "prison conditions" language in the PLRA.[9]

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[8] In reading *Farmer* and *Hudson*, we do not believe that we have blurred the distinction drawn by these cases between excessive force actions and conditions-of-confinement actions. Those distinctions of course, still obtain in substantive eighth amendment jurisprudence. However, for the many reasons detailed in the text, that distinction appeared not to be on Congress's mind—nor did it control Congress's hand—when it crafted the procedural bars it did in the PLRA.

[9] The dissent reasons that in enacting the PLRA Congress was concerned only with frivolous prisoner lawsuits, such as those enumerated in note 5, *supra*, rather than "'actual violations of prisoners' rights.'" Dissent at 302 (quoting 141 Cong. Rec. S14408-01, S14418 (Sept. 27, 1995) (Sen. Hatch)). Therefore, it concludes, § 1997e(a) was not intended to encompass excessive force claims. We find three things wrong with this argument.

First, in recounting the large number of lawsuits brought by

prisoners in the few years preceding the passage of the PLRA, several members of Congress cited statistical evidence regarding the number of actions filed by prisoners, and the crushing burden these suits have on federal courts. *See Blas v. Endicott*, 31 F. Supp. 2d 1131, 1133 n. 4 (E.D. Wis. 1999) (collecting examples of this legislative history). The statistical studies they cited did not distinguish between conditions-of-confinement actions and excessive force actions, or even those addressing the brutal violations of prisoners' rights. *See, e.g.*, 141 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham) (noting that "[i]n 1995, 65,000 prisoner lawsuits were filed in federal courts alone" without distinguishing among the many types of suits filed); 141 Cong. Rec. S14626-27 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (cataloguing the some 39,000 non-habeas lawsuits filed by inmates in federal courts in 1994, and, as with Sen. Abraham, not distinguishing between conditions-of-confinement actions and excessive force actions). The way this data was presented supports the conclusion that § 1997e(a) applies to *all* prisoner lawsuits, all of which have the *potential* to be frivolous and unduly burden courts, rather than a particular subcategory of claims, as the dissent contends.

Second, examination of the PLRA's legislative history reveals that opponents of the PLRA objected to it on the ground that it would frustrate prisoners in their attempts to pursue meritorious § 1983 excessive force actions. *See* 141 Cong. Rec. S14628 (1995) (statement of Sen. Biden) (discussing two prison assault cases as examples of meritorious suits that would be hindered by passage of the PLRA). These remonstrations—and Congress's failure to heed them—suggests that, in enacting the PLRA, Congress knew what it was doing, and intended that excessive force actions be subject to the exhaustion requirements in § 1997e(a).

Third, sections of the PLRA *other* than § 1997e(a) address the frivolous/non-frivolous lawsuit distinction to which the dissent is so attuned. *See* Dissent at 301-303. For example, 42 U.S.C. § 1997e(c)(1) empowers district courts to dismiss frivolous claims of the chunky peanut butter variety, *sua sponte*. Similarly, 28 U.S.C. § 1915(b)

III.

Turning our attention to the application of § 1997e(a) to Booth's action, Booth concedes that he did not take full advantage of the administrative procedures available to him at Smithfield. After he was allegedly assaulted by the Defendants, he filed several administrative grievances with the Commonwealth

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discourages inmates from filing frivolous suits by forcing inmate-plaintiffs proceeding *in forma pauperis* to pay court costs and filing fees. Lastly, 28 U.S.C. § 1915(g) closes the door, absent exceptional circumstances, to inmate-plaintiffs who previously have brought three frivolous lawsuits. 42 U.S.C. § 1997e(a), by contrast, makes no mention of the word "frivolous." Nor does it except from its broad swath actions with respect to "actual violations of prisoners' rights.'" Dissent at 302 (citation omitted), as other sections of the PLRA, such as 28 U.S.C. § 1915(g), explicitly do, *see* 28 U.S.C. § 1915(g) (allowing a inmate-plaintiff who has previously brought three frivolous actions to bring a subsequent civil action if he is "under imminent danger of serious physical injury").

> If anything, § 1997e(a)'s mandatory exhaustion requirement enables district courts hearing these prisoner claims to distinguish better between frivolous and meritorious ones. As we noted recently in *Nyhuis v. Reno*, "The administrative process can serve to create a record for subsequent proceedings, it can be used to help focus and clarify poorly pled or confusing claims, and it forces the prison to justify or explain its internal procedures." 204 F.3d at 76 (3d Cir. 2000). The administrative process therefore makes prisoner litigation claims more transparent and easier to review. Operating effectively, the administrative process should also afford district courts more time to address the serious concerns raised by meritorious claims. As *Nyhuis* further noted, § 1997e(a)'s exhaustion requirement was, in part, designed to provide federal courts more time to deal with such actions. *See id.* at 73-78.

of Pennsylvania's Department of Corrections Consolidated Inmate Grievance System (the Inmate Grievance System). When his requests for relief were denied, however, he failed to appeal those decisions as was his right under the Inmate Grievance System. *See supra* note 2 (discussing the two-stage appellate process). Again, § 1997e(a) provides that

> *No action shall be brought* with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted.*

42 U.S.C. § 1997e(a) (emphasis added).

Booth reads this language to mean that he did not need to take advantage of the Inmate Grievance System's administrative procedures because they could not provide him with the monetary relief that he sought in his federal action. For this proposition he cites, among other cases, *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998), *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998), and *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997). These cases hold that when a prison's internal grievance procedure cannot provide an inmate-plaintiff with the pure money damages relief he seeks in his federal action, exhaustion of those administrative remedies would be futile.[10]

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[10] The Defendants argue that Booth requested only injunctive relief in his complaint, and that he did not request remedies "not available" in the state's administrative process. Although Booth's pro se complaint form does not include a specific request for damages, the thirty some pages attached thereto make several references to personal injuries and make three separate claims for monetary relief. *See supra* Part I. Construing Booth's pro se complaint liberally, as we must, *see,*

Our recent opinion in *Nyhuis v. Reno*, 204 F.3d 65, 72 (3d Cir. 2000), rejected the narrow futility exception recognized in *Whitley*, *Lunsford*, and *Garrett*; and the rule announced in *Nyhuis* is dispositive in this case. In *Nyhuis*, we held that "the PLRA amended § 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory–whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." *Id.* at 67. In a lengthy opinion, we detailed the many arguments supporting our position, and ultimately rejected the approach taken by courts recognizing the futility exception. *See, Id.* at 71-78.

Although *Nyhuis* involved a *Bivens* action brought by a federal inmate, the rule we announced in *Nyhuis* has equal force in the § 1983 context, for § 1997e(a), which applies to actions brought by a prisoner "under section 1983 of this title, or any other federal law," treats *Bivens* actions and § 1983 actions as functional equivalents. *See, Nyhuis*, 204 F.3d at 68; *Lavista v. Beeler*, 195 F.3d 254, 256 (6th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321, 1324-25 (11th Cir. 1998); *Garrett v. Hawk*, 127

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e.g., Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 456 (3d Cir. 1996), we conclude that he did request monetary relief in his original complaint, when that complaint is viewed as a whole. Moreover, even if Booth's initial complaint failed to allege money damages, the record shows that he amended his complaint to include a request for damages, as was his right under Fed. R. Civ. Pro. 15(a). In separate pleadings filed seven days and a month after his original complaint, Booth again made reference to his allegations regarding money damages. Fed. R. Civ. Pro. 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." Judging from the docket entries, the Defendants served no responsive pleadings between the time Booth filed his April 21, 1997 complaint and the time that he filed these later pleadings."

F.3d 1263, 1264-66 (10th Cir. 1997). Indeed, the *Nyhuis* rule has even greater force with respect to § 1983 actions. First, as we explained in *Nyhuis*, additional comity considerations obtain in the § 1983 context—which are not implicated by a *Bivens* action—given the strength of the interest that state prisons and state courts have in resolving complaints filed by state prisoners. *See Nyhuis*, 204 F.3d at 76 n. 11 (citing *Presider v. Rodriguez*, 411 U.S. 475, 491-92, 93 S. Ct. 1827, 36 L.Ed.2d 439 (1973) (discussing these comity concerns)).

Second, additional federalism and efficiency considerations are implicated when reviewing § 1983 actions—as compared to *Bivens* actions—because of the greater difficulty federal courts may have in interpreting and/or predicting the contours of state law and state administrative regulations and practices. *See, Id.* at 75 n. 10 and accompanying text. As we noted in *Nyhuis*, the Supreme Court has "made it clear that 'in the absence of a *plain indication* to the contrary,' Congress should not be understood to 'mak[e] the application of [a] federal act dependent on state law.'" *Id.* at 75 n. 10 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S. Ct. 1597, 104 L.Ed.2d 29 (1989)) (emphasis added by *Nyhuis*) (citations and internal quotations omitted). In drafting the PLRA, "Congress gave no indication—let alone a 'plain indication'—that application of § 1997e(a) should depend on the vagaries of state law." *Id.* For these reasons, we therefore hold that the rule we announced in *Nyhuis* applies here.

As in *Nyhuis*, because Booth "failed . . . to exhaust his available administrative remedies (rather than those he believed would be effective)" before filing his § 1983 action, the District Court appropriately dismissed his action without prejudice. *Id.* at 78. Accordingly, the order of the District Court will be affirmed.

NOONAN, Circuit Judge, concurring and dissenting:

The crux of the case is what Congress meant by the statutory term "prison conditions." Of the two words, "conditions" is the key. The noun is plural. It is equivalent to "circumstances." It does not identify a single or momentary matter. *Webster's* provides us with six definitions. Five are not germane. The relevant definition is "existing state of affairs," as in the common phrase "living conditions," "playing conditions," "adverse weather conditions." A slight variant of this definition is "something needing remedy," as in the sentence, "Trains were late to Philadelphia because of conditions on the Main Line." As these instances suggest, "conditions" are circumstances affecting everyone in the area affected by them. "Conditions" affect populations, large or small.

The statute this gives us a noun of established meaning and frequent use. This noun is modified by a second noun, "prison." No ambiguity exists as to its meaning. It identifies the affected population. We have, then, a statutory term "prison conditions" that can only mean "a state of affairs in a prison" or "something needing remedy in a prison." The slight variation does not alter the sense conveyed by "conditions" of more than a momentary event; "conditions" means something that has continued in effect for a period.

A punch on the jaw is not "conditions." A punch in the jaw in prison is not "prison conditions." A punch on the jaw is an act. Churner's alleged busting of Booth's mouth is not a state of affairs. Circumstances in the plural are not at issue. No population is affected. An individual alone is involved. That Churner's alleged blow took place in a prison does not make it "prison conditions." Reading the statute as it is written it is next

to impossible to characterize Booth's complaint of a specific battery as a suit "with respect to prison conditions."

The court rightly notes that we may aid our reading by consulting another section of the statute where Congress has defined "prison conditions" for another purpose. It makes good sense to assume that the definition applies throughout the statute and to use the definition whenever "prison conditions" are mentioned.

In §3626(g)(2) Congress defined "prison conditions" as "conditions of confinement or the effects of actions by government officials in the lives of persons confined to prison." The definition is good evidence that when Congress wanted to extend the meaning of "prison conditions" beyond the ordinary sense of the phrase it knew how to do so. In the definition, Congress did not extend the meaning of "prison conditions" to include acts of battery carried out by officers of a prison. The statutory phrase "conditions of confinement" does not encompass specific batteries. "Conditions of confinement" is no more apt than "prison conditions" to designate an act of battery. The use of "conditions" constrains the sense so that what is meant is a continuing state of affairs. The court concedes that this part of the statutory definition has no application here.

The court invokes *McCarthy v. Bronson*, 500 U.S. 136, 111 S. Ct. 1737, 114 L.Ed.2d 194 (1991), but then does not rely on the statutory language there construed but on the alternative definition afforded by the statute. This definition defines prison conditions as "the effects of actions by government officials in the lives of persons confined in prison." What are actions by government officials that impact the lives of prisoners and appropriately fit within the framework of conditions? Illustrations are afforded by a proponent of the PLRA, Senator Abraham: "how warm the food is, how bright the lights are, whether

there are electrical outlets in each cell, whether the prisoners' hair cut is by licensed barbers," these are "the conditions" regarding which prisoner litigation has occurred and courts have intervened because of the effect of these conditions on prisoners' lives. 142 Cong. Rec. S10576-02, S10576 (Sept. 16, 1996). To take another illustration, "even worse" according to Senator Abraham, is a judge releasing prisoners "to keep the prison population down to what the judge considered an appropriate level." *Id.* In each of these instances an action by a government official—to provide a kitchen or delivery service leading to lukewarm food; or to save on electricity; or to employ unlicensed barbers; or to admit more prisoners than the prison was designed for—has an impact on prisoners' lives and creates conditions that, but for the PLRA, might become the subject of a suit. Other actions having an effect on prisoners' lives and referenced by Senator Reid, are these: a prison official decides to provide creamy peanut butter instead of chunky or provides chunky peanut butter instead of creamy; a prison official decides not to offer salad bars or weekend brunches; a prison official decides to play classical music on the prison stereo system. 141 Cong. Rec. S14611-01, S14627 (Sept. 29, 1995). These actions indubitably had an effect on prisoners' lives by creating conditions that, prior to passage of the PLRA, gave rise to prison litigation. In no way are any of these actions comparable to specific acts of intentional violence. Brutal batteries are far removed from what the sponsors said was on their minds. The senators chose language for the statute mirroring their concerns.

Snippets of legislative history such as these are not necessary to explain the statutory phrase. They are, however, to the point in a way that interpretations of the legislation offered in by its opponents in debate are not. They are, moreover, illuminating as to why Congress had to use fifteen words in a seemingly elephantine way to define the suits Congress wanted to restrain. The multitude of trivial occasions that might affect

prisoners' lives could only be captured by a calculated comprehensiveness that excludes individual acts of rape or beating.

A guard hits you on the mouth. Would you report the blow by saying, "A government official has taken an action having an effect on my life?" No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

The supposition that Congress spoke so ineptly may be sustained by the suspicion that Congress wanted to get rid of all prisoner litigation, therefore Congress must have intended to embrace allegations of specific acts of battery. As a guess at unarticulated policy, such speculation has its attraction. The suspicion is dispelled by leading sponsors of the PRLA such as the chairman of the Senate Judiciary Committee, Senator Hatch. As he put it when offering the bill for the first time in 1995: "Our legislation will also help restore balance to prison conditions litigation and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights." 141 Cong. Rec. S14408-01, S14418 (Sept. 27, 1995). As he summarized the sponsors' intent: "I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised." 141 Cong. Rec. S14611-01, S14662 (Sept. 29, 1995). The sponsors of the bill were neither inhumane nor insensitive nor determined to foreclose federal fora to claims of unconstitutional acts of cruelty.

The legislative history serves to refute a suspicion unsupported by the statutory text. As a guide to a fair reading of the English language in the statute before us, the suspicion is mischievous. It leads to a construction of language that cannot be sustained. The canons of construction of our native tongue

should not be contorted to deny a remedy that a conscientious Congress continues to provide.

There are, to be sure, issues raised as to prison conditions in Booth's amended complaint–the state of the prison library, for example, Booth's need for a paralegal, or the failure of prison authorities to prevent alleged beatings. No cause of action against Superintendent Morgan, Captain Gardner or Sergeant Workensher can be discerned that does not fall within the meaning of prison conditions. These complaints Booth should have processed through the prison grievance system. Failing to do so, Booth cannot pursue them now. As to these claims, I concur with the court. But that he put these matters into his complaint does not mean that he forfeits the claims whose treatment was not required to begin administratively. As to Lieutenant Rikus, no specific injury is alleged for which compensation is asked. The complaint here, too, is properly dismissed. The allegations against Churner, Robinson and Thomas survive. As to them I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TIMOTHY BOOTH,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-97-0611
	:	
C.O. CHURNER, et al.,	:	**[FILED JULY 17, 1997]**
	:	
Defendants	:	

ORDER

NOW, THIS 17th DAY OF JULY, 1997, upon consideration of plaintiff's motion to amend complaint, (Doc. No. 28), IT IS HEREBY ORDERED THAT said motion is dismissed as moot, as plaintiff's case was closed on May 30, 1997.

[signed]
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:97-cv-00611 Booth v. Churner

True and correct copies of the attached were mailed by the clerk to the following:

Timothy Booth
SCI-SM
CN-3556
P.O. Box 999
1120 Pike Street
Huntingdon, PA 16652

cc:	( )
Judge	( )
Magistrate Judge	( )
U.S. Marshal	( )
Probation	( )
U.S. Attorney	( )
Atty. for Deft.	( )
Defendant	( )
Warden	( )
Bureau of Prisons	( )
Ct Reporter	( )
Ctroom Deputy	( )
Orig-Security	( )
Federal Public Defender	( )

Summons Issued	( )	with NIC attached to complt. and served by:
		U.S. Marshal ( )
		Pltfls Attorney ( )
Standard Order 93-5	( )	
Order to Show Cause	( )	with Petition attached & mailed certified mail
		to: US Atty Gen ( )
		PA Atty Gen ( )
		DA of County ( )
		Respondents ( )
Bankruptcy Court	( )	
Other _____	( )	

MARY E. D'ANDREA, Clerk

DATE: 7/18/97 BY: [signed]
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TIMOTHY BOOTH,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-97-0611
	:	
C.O. CHURNER, et al.,	:	**[FILED JULY 3, 1997]**
	:	
Defendants	:	

ORDER

Background

On April 21, 1997, Timothy Booth, an inmate at the State Correctional Institution at Smithfield in Huntingdon, Pennsylvania, filed the above-captioned pro se civil rights action under 42 U.S.C. § 1983. Along with his complaint, the plaintiff submitted an application requesting leave to proceed in forma pauperis under 28 U.S.C. § 1915. By order of May 30, 1997, the complaint was dismissed, without prejudice, pursuant to 42 U.S.C. § 1997e(a) for plaintiff's failure to exhaust administrative remedies.

On June 9, 1997, Booth filed a document entitled "Motion to Vacate Judgment." In that document Booth requests that the order dismissing his complaint be reconsidered. Although Booth has not filed a brief in support of the motion, the court will construe the motion as a motion for reconsideration

and a brief in support thereof and for the following reasons deny the motion.

Discussion

It is well-settled that a motion for reconsideration is a device of limited utility. It may be used only to seek remediation for manifest errors of law or fact or to present newly discovered evidence which, if discovered previously, might have affected the court's decision. Harasco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); Massachusetts Mutual Life Insurance Co. v. Maitland, Civil No. 87-0827 (M.D. Pa. March 1, 1989) (Rambo, J.).

Booth does not raise or set forth any arguments in his motion for reconsideration that call into question our order of May 30, 1997. That order is not troubled by manifest errors of law or fact and Booth has not presented anything new which, if previously presented, might have affected our decisions. Consequently, the motion for reconsideration will be denied.

NOW, THIS 3rd DAY OF JULY, 1997, IT IS HEREBY ORDERED THAT:

1. Document 18 of the record is construed as a motion for reconsideration and a brief in support thereof.

2. Booth's motion for reconsideration is denied.

[signed]
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:97-cv-00611 Booth v. Churner

True and correct copies of the attached were mailed by the clerk to the following:

Timothy Booth
SCI-SM
CN-3556
P.O. Box 999
1120 Pike Street
Huntingdon, PA 16652

cc:	( )
Judge	( )
Magistrate Judge	( )
U.S. Marshal	( )
Probation	( )
U.S. Attorney	( )
Atty. for Deft.	( )
Defendant	( )
Warden	( )
Bureau of Prisons	( )
Ct Reporter	( )
Ctroom Deputy	( )
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		U.S. Marshal ( )
		Pltfls Attorney ( )
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Order to Show Cause	( )	with Petition attached & mailed certified mail
		to: US Atty Gen ( )
		PA Atty Gen ( )
		DA of County ( )
		Respondents ( )
Bankruptcy Court	( )	
Other _____	( )	

MARY E. D'ANDREA, Clerk

DATE: 7/3/97 BY: [signed]
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TIMOTHY BOOTH, Plaintiff	:	
v.	:	CIVIL NO. 3:CV-97-0611
C.O. CHURNER, et al., Defendants	:	**[FILED MAY 30, 1997]**

ORDER

Background

Timothy Booth, an inmate presently confined in the State Correctional Institution at Smithfield, (the "Prison") in Huntingdon, Pennsylvania, filed the captioned civil rights complaint pursuant to 42 U.S.C. § 1983. Along with his complaint, the plaintiff submitted an application requesting leave to proceed in forma pauperis under 28 U.S.C. § 1915. For the reasons outlined below, the complaint will be dismissed without prejudice, pursuant to 42 U.S.C. § 1997e(a).

With respect to the applicability of administrative remedies, 42 U.S.C. § 1997e(a) reads as follows:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until

> such administrative remedies as are available are exhausted.

This provision makes no distinction between an action for damages, injunctive relief, or both. Thus, prisoners are required to exhaust available administrative remedies prior to initiating a prison conditions case brought pursuant to 42 U.S.C. § 1983 or any other federal law.

As previously stated, the instant case was initiated pursuant to 42 U.S.C. § 1983. Liberally construing the complaint of this pro se litigant, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972), the plaintiff generally alleges that the defendants should be held liable for violating his right to be free from cruel and unusual punishment, which was created by the Eighth Amendment to the United States Constitution. The named defendants are Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, Captain Gardner and Superintendent Morgan. The plaintiff, however, refers to only three of the defendants in the body of his complaint.

Specifically, with respect to defendant, Lt. Rikus, the plaintiff states that "words [were] exchanged [between] he and Lt. Rikus and Lt. Rikus said he should back hand slap [plaintiff] and [plaintiff] said go ahead." Plaintiff claims that Lt. Rikus "grabbed [plaintiff's] arm and shoved [him] into the shelf in the storage room." With respect to defendants Churner and Workensher, he asserts that these defendants, along with another corrections officer, came to plaintiff's cell to conduct a strip search. He states that "Churner told [him] to face the wall." Plaintiff maintains that defendant Churner "uncuffed one hand and asked [plaintiff] if [he] spit in Officer White's face." Plaintiff claims that Churner then "punched [plaintiff's] face and mouth." The plaintiff does not allege what injury, if any, he sustained as a result of the defendants alleged actions. For relief,

he seeks a transfer to another prison because "his safety and life is at stake." (Doc. No. 1, complaint).

The Pennsylvania Department of Corrections has a Consolidated Inmate Grievance Review System. DC-ADM 804 (effective October 20, 1994). With certain exceptions not applicable here, DC-ADM 804, Section VI ("Procedures") provides that, after attempted informal resolution of the problem, a written grievance may be submitted to the Grievance Coordinator; an appeal from the Coordinator's decision may be made in writing to the Facility Manager or Community Corrections Regional Director; and a final written appeal may be presented to the Central Office Review Committee. If the grievance concerns an alleged medical problem, any appeal must be taken to the Central Office Medical Review Committee.

The instant suit concerns prison conditions. On the question of administrative exhaustion, attached to the complaint is a copy of an initial review response to a grievance filed by plaintiff concerning his claims of abuse, which was dismissed on March 13, 1997. There is no indication that he appealed the dismissal of this grievance. In that connection, the procedure contemplates several tiers of review and the Grievance Review System is not exhausted when an inmate files a grievance and then takes no other action through established channels when a grievance is not resolved to his or her satisfaction. Plaintiff's apparent failure to comply with 42 U.S.C. § 1997e(a), as amended, warrants the dismissal of his complaint but without prejudice. See Pew v. Imschweiler, et al., Civil Action No. 96-0760 (M.D. Pa. September 12, 1996) (Kosik, J.); Johnson v. Gillis, et al., Civil Action No. 96-1569 (M.D. Pa. August 29, 1996) (Conaboy, J.); Lubawski v. Horn, et al., Civil Action No. 96-1371 (M.D. Pa. July 29, 1996) (Rambo, C.J.); Smith v. Giza, Civil Action No. 96-1167 (M.D. Pa. July 2, 1996) (Rambo,

C.J.); Brooks v. Superintendent Lunk of Div. 10, et al., No. 96C3221, 1996 WL 308268 (N.D. Ill. June 5, 1996).

AND NOW, THEREFORE, THIS 30th DAY OF MAY 1997, IT IS HEREBY ORDERED THAT:

1. The complaint is dismissed without prejudice, pursuant to 42 U.S.C. 1997e(a) for failing to exhaust administrative remedies;[1]

2. The motions filed by plaintiff subsequent to the filing of his complaint, (Doc. Nos. 6-8 & 13) are dismissed as moot; and

3. The Clerk of Court is directed to close this case.

[signed]
United States District Judge

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[1] The dismissal of this action does not relieve Booth of the obligation to pay the full filing fee. Until the filing fee is paid in full, the Administrative Order, issued April 21, 1997, is binding on the warden of SCI-Smithfield and the warden of any correctional facility to which Hall may be transferred.

Supreme Court, U.S.
FILED
JUN 07 2000
CLERK

No. 99-1964

In the Supreme Court of the United States

TIMOTHY BOOTH,
Petitioner

v.

C.O. CHURNER, SERGEANT WORKENSHER, LIEUTENANT RIKUS AND CAPTAIN GARDNER,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III*
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QUESTION PRESENTED

Whether, under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), a prisoner must exhaust administrative remedies where the administrative process does not provide for money damages, and the prisoner is seeking both monetary and non-monetary relief?

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The opinion of the Court of Appeals is reported at 206 F.3d 289 and is reprinted in the appendix to the petition ("Pet. App.") at 1a. The opinion of the District Court is not reported but is reprinted at Pet. App. 36a.

STATEMENT OF THE CASE

This is a civil rights action by a state prisoner against four Pennsylvania prison officials. The petitioner is Timothy Booth, who at the time of the events he complains of was imprisoned at the State Correctional Institution at Smithfield, Pennsylvania. Pet. App. 36a. The respondents are Correctional Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain W. Gardner, all of whom were employed at the same prison.[1] Pet. App. 4a.

1. Booth complains of four separate incidents. First, he claims that in April of 1996, he was assaulted by two prison officials (neither of whom he named as a defendant in this action); as a result, he has "a shoulder that slips in and out," for which he was denied an operation. Second, he claims that on February 6, 1997, a prison official — who again is not named as a defendant — threw cleaning material in his face. Third, he claims that on February 7, 1997, he was shoved into a storage shelf by respondent Rikus, and mistreated by other officers. Finally, he claims that on March 23, 1997, respondent Churner

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[1]In the District Court, Booth also named the Superintendent of the Smithfield correctional institution as a defendant. Pet. App. 37a. The Superintendent, however, is not named as a respondent in this Court.

punched him in the mouth in the presence of respondent Workensher. Pet. App. 4a-5a.

2. Booth, proceeding pro se, filed his complaint in the Middle District of Pennsylvania in April of 1997, seeking relief pursuant to 42 U.S.C. § 1983. Initially, he sought only an order transferring him to another prison, Pet. App. 4a, 38a, but in subsequent filings he expanded on the relief he sought, requesting orders "to stop the continuous beatings," to obtain an operation, to improve the prison law library, to fine prison officials for contempt of court, to obtain paralegal assistance, and to disclose prison records. Pet. App. 5a. He also amended his complaint to seek compensatory and punitive damages. Pet. App. 5a, 21a-22a n.10.

The District Court dismissed Booth's complaint without requiring a response from the defendants. *See* 42 U.S.C. § 1997e(c). The District Court noted that 42 U.S.C. § 1997e(a) provides that:

> No action shall be brought with respect to prison conditions under ... any ... Federal law, by a prisoner ... until such administrative remedies as are available are exhausted.

Pet. App. 36a-37a. The District Court further noted that Pennsylvania's state prison system provides for prisoners to submit written grievances for resolution, and provides for several levels of review and appeal, Pet. App. 38a; and that, while Booth had submitted a grievance about his claims of abuse, he had not appealed the dismissal of that grievance. Pet. App. 38a. The District Court therefore concluded that Booth had not exhausted the administrative remedies available to him, and dismissed his complaint without prejudice. Pet. App. 38a-39a. Booth appealed.

3. In the Court of Appeals, Booth conceded that he had not exhausted his administrative remedies, Pet. App. 20a, but argued that, because those remedies could not provide him with the money damages he sought, exhaustion would be futile and therefore not required.[2] Pet. App. 21a. The Court of Appeals, relying on its recent decision in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), rejected this argument. Pet. App. 22a-23a. In *Nyhuis*, the Court of Appeals had held that Section 1997e(a) "make[s] exhaustion of all administrative remedies necessary — whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." 204 F.3d at 67, *quoted at* Pet. App. 22a. *Nyhuis* was a *Bivens* action against federal officials, but the Court of Appeals held that its rationale applied equally — indeed, with even greater force — to Section 1983 actions against state officials. Pet. App. 22a-23a. Accordingly, the Court of Appeals affirmed the order of the District Court.

REASONS FOR DENYING THE WRIT

I. The issue presented by the petition was neither presented to nor decided by the courts below.

The petitioner claims that the issue in this case is whether Section 1997e(a) requires exhaustion of administrative remedies where a prisoner is seeking "*only* monetary damages," and money damages are not available through the administrative process. Pet. i (emphasis added). According to petitioner, the

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[2]Booth also argued that his action was not one "with respect to prison conditions" within the meaning of Section 1997e(a). The majority of the Court of Appeals panel rejected this argument, Pet. App. 8a-19a, *cf.* Pet. App. 24a-28a (Noonan, J., concurring and dissenting), and Booth does not pursue it in this Court. Pet. 6 n.3.

Courts of Appeals are in "clear," "absolute," "direct" and "irreconcilable" conflict on this issue. Pet. 1, 7.

However that may be, that is not the issue presented to, and decided by, the courts below in this case. Petitioner did not file an action seeking "only monetary damages"; as we discussed above, he filed an action seeking both money damages and a variety of non-monetary relief. *See supra* at 2. Petitioner suggests in a footnote that, because he was transferred to another prison, "his claims for injunctive relief became moot." Pet. 5 n.2. This, however, ignores the fact that petitioner requested not only that he be moved to another prison, but other relief as well — such as an operation on his injured shoulder — which would not be mooted by a transfer. It ignores likewise the fact that neither of the courts below treated his injunctive claims as moot, but instead decided this case on the assumption that petitioner had live claims for both monetary and non-monetary relief.

As we now discuss, the Courts of Appeals which have addressed this issue are in substantial, although not complete, agreement on the proper treatment of such "mixed" claims. With one exception, those courts agree that prisoners who present claims for both monetary and non-monetary relief are required by Section 1997e(a) to exhaust administrative remedies even if money damages are not available through the administrative process. To the extent that conflict on this issue exists at all, it is both extremely recent and limited in scope; and it would be premature for the Court to step in now.

II. The Courts of Appeals are in substantial agreement that prisoners who present "mixed" claims for monetary and non-monetary relief must first exhaust their administrative remedies.

Petitioner argues at length that the Courts of Appeals are deeply divided over whether a prisoner must exhaust administrative remedies when those remedies do not provide for the recovery of money damages, *and money damages are the only relief the prisoner seeks.* Pet. 7-13. That is not the case, however, where, as here, the prisoner seeks both monetary and non-monetary relief; in such "mixed" cases, most of the Courts of Appeals agree that exhaustion is required.

The Third, Sixth, Seventh and Eleventh Circuits require exhaustion in all cases, even where a prisoner seeks only money damages. *See Nyhuis v. Reno*, 204 F.3d at 71; *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 537 (7th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998). The Fifth Circuit does not require exhaustion in such cases, but does require it in "mixed" cases. *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998). The Ninth Circuit likewise does not require exhaustion where only money damages is sought, but has "impliedly rejected" this rule for "mixed" cases. *Nyhuis v. Reno*, 204 F.3d at 71 & n.7, *citing Rumbles v. Hill*, 182 F.3d 1064, 1069 (9th Cir. 1999) *and Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998).

Only within the last few weeks has any Court of Appeals adopted a different rule, and then only in part. The Tenth Circuit recently held that, in "mixed" cases where money damages are not available through the administrative process, administrative remedies must be exhausted as to the non-monetary claims, but

not as to the claims for money damages. *Miller v. Menghini*, — F.3d —, 2000 WL 639688 (10th Cir. 2000). The *Miller* panel adopted this rule with little real analysis, relying on *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997), which dealt not with a "mixed" claim but solely a claim for money damages, and on unpublished Tenth Circuit decisions which themselves contain only perfunctory treatment of the issue. *See Miller*, at *1, *citing Fever v. Booker*, 1999 WL 136922 (10th Cir. 1999) *and Florence v. Booker*, 1998 WL 694521 (10th Cir. 1998). Neither in *Miller* nor in any of the cases on which it relies is there any discussion — still less any analysis — of the reasoning of the other Courts of Appeals which have dealt with the issue of "mixed" claims.

Certainly, *Miller* does not present the long-standing, pervasive and reasoned disagreement among the circuits on which the petitioner stakes his claim to this Court's review. To the contrary, *Miller's* newness, its lack of any real analysis of the issue, and the isolated position in which it places the Tenth Circuit, all militate against review by the Court at this time.

CONCLUSION

The Court should deny the petition.

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No. 99-1964

In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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PETITIONER'S REPLY BRIEF

In their opposition to the petition for a writ of *certiorari*, respondents concede that there is a conflict among the circuits on the question presented in the petition. Given that clear conflict, respondents do not even attempt to argue that the question presented is not worthy of this Court's consideration, and, by implication, concede that it is. Instead, respondents attempt to avoid this Court's review of this important issue of federal statutory interpretation by making the factually erroneous and legally irrelevant argument that the question presented was not presented to or decided by the courts below. Petitioner Timothy Booth files this reply brief in order to show that: (1) as a matter of fact, this case was a "money damages only" case when it reached the Court of Appeals, not a "mixed" case, because Mr. Booth's injunctive claims were moot; and (2) as a matter of law, the distinction that respondents draw between "money damages only" cases and "mixed" cases is irrelevant here.

ARGUMENT IN REPLY

I. THIS CASE WAS PRESENTED TO THE COURT OF APPEALS AS A "MONEY DAMAGES ONLY" CASE BECAUSE MR. BOOTH'S CLAIMS FOR INJUNCTIVE RELIEF ARE MOOT.

Respondents pin their entire argument on their characterization of this case as a "mixed" case, as to which

they assert *certiorari* is not warranted.[1] However, respondents' contention that this is a "mixed" case is factually erroneous because Mr. Booth's claims for injunctive relief are moot, in view of his transfer from the prison at which he allegedly was beaten to another prison. Only his claims for money damages remained viable in the Court of Appeals, and only his claims for money damages remain viable now.

Counsel for Mr. Booth conceded in both the briefing and oral argument in the Court of Appeals that Mr. Booth's injunctive claims were mooted by his transfer. In the form complaint that he filed in the district court, Mr. Booth had sought compensatory damages, a "preliminary injunction," and a "protection order for transfer to another prison as both my safety and life is at stake." Pet. App. 4a. In a handwritten document filed with that form complaint, he sought money damages and also stated, "I need out of this jail before they kill me. And I want each and every officer to be punished for assaulting me. Please, I'm in fear of my life." *Id.* 5a. Then, Mr. Booth was, in fact, transferred to another prison, thus mooting his injunctive claims.

Respondents seem to accept that much, but argue that Mr. Booth sought other injunctive relief in addition to a transfer, and, thus, that not all of his injunctive claims were mooted by the transfer. While it is true that in district court filings subsequent to the filing of his complaint, Mr. Booth sought other types of injunctive

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[1] Mr. Booth does not dispute that most of the courts of appeals agree that administrative exhaustion is required in "mixed" cases.

relief (including "an injunction to stop the continuous beating," an order "to get operation," an order to improve the prison law library, an order to hire paralegal assistance, and an order to disclose prison records, *see id.* 5a), none of these were actually part of his complaint or claims for relief. Accordingly, they should not control the section 1997e(a) exhaustion inquiry.

Moreover, even if Mr. Booth had included these additional requests as actual claims for relief in his complaint, most of them were resolved or mooted by his transfer to another prison. As to his request for a shoulder operation, this has been mooted by the passage of time, and counsel can represent that Mr. Booth no longer seeks such an operation. Thus, counsel's concession in the Court of Appeals that only Mr. Booth's money damages claim remained and that his injunctive claims were moot is conclusive as to both what was presented to the Court of Appeals and what this case involves.

Accordingly, respondents are wrong to attempt to dissuade this Court from considering the issue presented – an issue they agree is worthy of this Court's review – by depicting this case as a "mixed" case. It is, in fact, a case that seeks only monetary damages.

II. THE DISTINCTION THAT RESPONDENTS DRAW BETWEEN "MONEY DAMAGES ONLY" CASES AND "MIXED" CASES IS LEGALLY IRRELEVANT AND DOES NOT AFFECT THE EXISTENCE OF THE CIRCUIT CONFLICT HERE.

Even assuming *arguendo* what we have just disproved – that this is a "mixed" case – this case nonetheless would

be an appropriate vehicle to resolve the conflict among the circuits concerning "money damages only" cases. As far as the Third Circuit is concerned, there is no distinction between "money damages only" cases and "mixed" cases, and thus this case presents an appropriate vehicle to resolve the conflicts among the circuits.

In *Nyhuis v. Reno*, 204 F.3d 65, 71 (3d Cir. 2000) (the Third Circuit decision that preceded this decision), the Court of Appeals made crystal-clear that its holding that section 1997e(a) "completely precludes a futility exception to its mandatory exhaustion requirement" applies "under either the across-the-board exhaustion approach or the mixed-claim approach." According to the Court of Appeals, "the PLRA rendered, for the most part, irrelevant the distinction that [prior cases] drew between mixed claim actions and those involving requests for money damages." *Id.* at 71 n.7. Thus, whether Mr. Nyhuis had requested only monetary damages or both money damages and injunctive relief, the Court of Appeals' holding would have remained the same.

As a result, in the present case, the Court of Appeals did not even mention the "mixed" claim distinction that the Commonwealth now presses. Although the Court of Appeals in its factual recitation referred to Mr. Booth's injunctive claims (while neglecting to mention that those claims were mooted by his transfer), its legal analysis did not turn in any way, shape, or form on the existence of live injunctive claims – perhaps because there were none, or perhaps because the existence of live injunctive claims would not have affected the Court's analysis or holding in the least.

In short, the law of the Third Circuit is that, "the PLRA amended section 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory – whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." *Nyhuis*, 204 F.3d at 67 (quoted in *Booth*, *see* Pet. App. 22a). The Court of Appeals did not hold – as respondents now would recharacterize the decision – that prisoners who present "mixed" claims must exhaust administrative remedies: it held that prisoners always must exhaust administrative remedies. Thus, the distinction that respondents press is not only factually erroneous, but also legally irrelevant.

In short, the asserted distinction does not affect the existence of the circuit conflict. Even assuming that Mr. Booth's injunctive claims did remain part of this case, the circuit conflict that he identifies would persist. This is because the courts that require prisoners to exhaust administrative remedies regardless of whether those remedies can provide the relief sought necessarily will apply that rule in both "money damages only" and "mixed" cases. Accordingly, in both "money damages only" and "mixed" cases, the Third, Sixth, Seventh, and Eleventh Circuits always will require exhaustion. These circuits stand in direct conflict with the Fifth, Ninth, and Tenth Circuits, which never require exhaustion of "money damages only" cases, regardless of what might be their rule with respect to "mixed" cases. Thus, the distinction that respondents draw, even if it were factually correct, does not affect the existence of the circuit conflict here.

CONCLUSION

For all the above reasons, as well as those set forth in the petition for a writ of *certiorari*, petitioner Timothy Booth respectfully requests that this Court grant his petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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In The

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TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED FOR REVIEW

Whether 42 U.S.C. § 1997e(a), as amended by the Prison Litigation Reform Act, which provides that a prisoner must exhaust "such administrative remedies as are available" before bringing a federal action, requires a prisoner seeking only monetary damages to exhaust administrative remedies where monetary damages are not available under the applicable administrative process.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner is Timothy Booth, who is currently a prisoner incarcerated at the State Correctional Institution at Graterford in Pennsylvania. Respondents are Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain Gardner.

There are no corporate parties, and, accordingly, no designation of corporate relationships pursuant to Supreme Court Rule 29.6 is required.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000), and appears in the appendix to the petition at pages 1a-28a.[1] The opinion of the United States District Court for the Middle District of Pennsylvania dismissing Mr. Booth's complaint under 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies is not reported. It appears in the appendix to the petition at pages 36a-39a.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit entered judgment on March 7, 2000. The petition for a writ of *certiorari* was filed on June 5, 2000, and was granted on October 30, 2000.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1997e(a) (Supp. II 1996) provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

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[1] References to the Appendix to the petition for a writ of *certiorari* are designated "___a." References to the Joint Appendix filed concurrently with this brief are designated "___Ja."

STATEMENT OF THE CASE

This case arises out of allegations by Timothy Booth, a state prisoner in Pennsylvania, that he was physically assaulted by prison guards on four separate occasions while confined at the State Correctional Institution at Smithfield in Huntington, Pennsylvania. Proceeding *pro se* in the district court, Mr. Booth brought a complaint under 42 U.S.C. § 1983 against four prison guards, alleging that they violated his Eighth Amendment right to be free from cruel and unusual punishment. In his complaint, Mr. Booth sought both monetary damages for the alleged violation of his constitutional rights and a transfer to another prison. After he filed his complaint, while the case was pending before the United States Court of Appeals for the Third Circuit, Mr. Booth was, in fact, transferred to another prison, thereby eliminating this claim from the case and leaving Mr. Booth's claim for monetary damages. There is no dispute that Pennsylvania's administrative grievance procedure did not at the time permit the recovery of monetary damages.

The district court nonetheless dismissed the complaint under 42 U.S.C. § 1997e(a) because Mr. Booth had not exhausted administrative remedies. The court of appeals affirmed.

Mr. Booth's Allegations[2]

The first incident of which Mr. Booth complains took place in April of 1996, when Sergeant Robinson and Corrections Officer Thomas assaulted him, causing an injury to his shoulder. He alleges that his shoulder "slips in and out," and that, despite having been told by a prison doctor that he would receive an operation on his shoulder, he was denied an operation. 15Ja.

The second incident occurred in February of 1997, when, having not been given dinner on several occasions, Mr. Booth threw water on Officer Thomas. Mr. Booth alleges that Officer Thomas responded by taking Mr. Booth from his cell in handcuffs and throwing a cup of cleaning material in his face. *Id.*

The third assault occurred the next day. Mr. Booth alleges that Lieutenant Rikus took him from his cell and put him in a storage room. Lieutenant Rikus then shoved Mr. Booth into a storage room shelf, causing Mr. Booth to hit the side of his face on the shelf, and Officer Thomas pushed him into a door, while Sergeant White was looking on. Sergeant White then took Mr. Booth back to his cell, where Officer Thomas tightened and twisted his handcuffs in such a way as to injure Mr. Booth's wrists. Officer Thomas then left Mr. Booth handcuffed in his cell for half an hour. 15-16Ja.

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[2] The court of appeals was reviewing the district court's dismissal of Mr. Booth's complaint for failure to exhaust administrative remedies. Accordingly, we state the facts in the light most favorable to Mr. Booth. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Thereafter, Mr. Booth was relocated to another unit at Smithfield, where, in March of 1997, Officer Churner allegedly assaulted him in the course of a strip search by hitting him in the mouth, splitting his lip, while Sergeant Workensher and Corrections Officer Kuhan watched. Officer Kuhan then grabbed Mr. Booth, put him in a choke hold, and forced him to the floor. Mr. Booth's mouth wounds were sufficiently severe to require stitches. 16Ja.

On February 4, 1988, while Mr. Booth's appeal was pending in the court of appeals, Mr. Booth was transferred from Smithfield to another prison in Pennsylvania.[3]

The Pennsylvania Department of Corrections Grievance Procedure

The Commonwealth of Pennsylvania's Department of Corrections has a complex Consolidated Inmate Grievance Review System that is set forth in a lengthy single-spaced document, with additional pages that amend various aspects of the original document. It governs some, but not all, "problems or other issues of concern arising

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[3] The date of Mr. Booth's transfer from the State Correctional Institution at Smithfield does not appear in the district court record. However, based on Mr. Booth's prison records, counsel for Mr. Booth and counsel for Respondents have agreed that Mr. Booth was transferred from the State Correctional Institution at Smithfield to the State Correctional Institution at Pittsburgh on February 4, 1998.

during the course of confinement." 43Ja; *see* 50-51Ja (setting forth various categories of issues that are subject to other procedures).

A careful review of the grievance procedure reveals that it creates the following three-step administrative process (40-53Ja):

- First, grievances are submitted in writing for initial review to the facility's Grievance Coordinator, within fifteen days after the events upon which the grievance is based. 46Ja. The Grievance Coordinator then forwards the grievance to a Grievance Officer for "investigation and resolution." *Id.* Persons having personal knowledge of the subject matter may be interviewed, as may the grievant. 47Ja. Within ten working days of the Grievance Officer's receipt of the grievance, "the grievant shall be provided a written response to the grievance to include a brief rationale, summarizing the conclusions and any action taken or recommended to resolve the issues raised in the grievance." *Id.*

- Second, within five days of the receipt of this initial determination, the prisoner may appeal the determination to the Facility Manager or Regional Director, who then has ten days to notify the prisoner of the decision. 47-48Ja.

- Third, the prisoner who is dissatisfied with the disposition of the appeal from the initial review decision may appeal within seven days to the Central Office Review Committee for final review. 48Ja. Absent good cause, final review is not permitted if the prisoner

> has not complied with all the procedures governing the initial review and the appeal from the initial review. *Id.* The Central Office Review Committee must issue its decision within twenty-one days after its receipt of the appeal. 49-50Ja.

The grievance procedure further provides that "[a]ll proceedings pursuant to this directive are in the nature of settlement negotiations and will, therefore, be inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee." 51Ja.

The record shows that Mr. Booth filed at least three initial grievances within the prison grievance system about the assaults, but did not pursue the second and third steps of the grievance procedure. *See* 13-14Ja, 36-37Ja, 38-39Ja.[4] It is uncontroverted that during the

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[4] The record is confusing as to whether Mr. Booth in fact filed a grievance or grievances about each – or only certain – of the four assaults that became the basis of his federal lawsuit. What the record does reflect is that, on February 19, 1997, Mr. Booth filed a grievance complaining that he had "put in a slip to Capt. Glenny to be seen for an[ ] assault that happened but was never seen." 13Ja. On March 5, 1997, the Grievance Coordinator denied a grievance that Mr. Booth apparently filed on March 5 (not in the record) on the grounds that the grievance was "a duplicate" of an earlier lodged grievance, and that his request for placement in protective custody was denied because he was "already in disciplinary custody which is[ ] a very secure housing." 12Ja. On March 13, 1997, the Grievance Coordinator denied a grievance that Mr. Booth apparently filed on March 12 (also not in the record). That denial stated that no investigation was conducted because the grievance "mentioned no specific allegations" and that Mr. Booth had "claimed abuse by officers

relevant period, the Pennsylvania grievance procedure did not permit the recovery of monetary damages.[5]

Mr. Booth's Complaint

In his federal court action filed on April 21, 1997, under 42 U.S.C. § 1983, Mr. Booth sought, in essence, two types of relief: monetary damages for the alleged beatings that he suffered and injunctive relief, primarily in the form of a transfer to another prison. In his complaint, Mr. Booth sought compensatory and nominal damages, along with a "preliminary injunction" and a protective order for transfer to another prison as "my safety and life is at stake." 11Ja, 9Ja.

In subsequent pleadings,[6] Mr. Booth reiterated his requests for both monetary damages and a transfer. In a pleading entitled, "Affidavit for Show of Cause for Emergency Preliminary Injunction and Protective Order," filed

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in the past and investigation has always reflected false claims." 10Ja.

[5] The Commonwealth of Pennsylvania Department of Corrections amended the Consolidated Inmate Grievance Review System, effective May 1, 1998, to provide that, "[t]he Grievant may also include a request for compensation or other legal relief normally available from a court." 60Ja. The Commonwealth conceded in the court of appeals that Mr. Booth could not have obtained monetary damages through the grievance system as it existed during the relevant time. *See* Appellees' Br. at 7, *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000) (Nos. 97-7487, -7488) (filed July 13, 1999).

[6] Because the defendants did not answer Mr. Booth's complaint, the court of appeals appropriately construed his subsequent filings as, in effect, an amendment to his complaint. *See* 22a n.10.

one week after he filed his complaint, Mr. Booth once again sought "nomi[n]al punitive exemplary and compensatory" damages, and a transfer. 20Ja, 18Ja. Three weeks later, Mr. Booth filed a document entitled, "Petition for Affirmative Order 'Records' Also Relief Plaintiff Seeks." 24Ja. In this pleading, Mr. Booth requested money damages in the amount of $750,000, $400,000, and $300,000; a transfer "to any prison for protection against beating"; an order to upgrade the prison law library; and an order to hire a paralegal, among other things. 24Ja, 25Ja; *see also* 26Ja, 28Ja, 33Ja, 35Ja.

The Proceedings Below

The district court, acting *sua sponte*, dismissed Mr. Booth's complaint without prejudice for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) because Mr. Booth did not avail himself of the next tiers of the grievance procedure after his initial requests for relief were denied. 36a-39a.

The Court of Appeals for the Third Circuit affirmed, applying to state prisoners the rule it previously had adopted for federal prisoners in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000). *See* 22a. In *Nyhuis*, the court had held that "the PLRA amended § 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory – whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." *Nyhuis*, 204 F.3d at 67.

Although *Nyhuis* was a so-called "mixed claim" case, in that Mr. Nyhuis sought both injunctive relief and monetary damages, the court chose not to rest its holding on that fact. Rather, as the court explained:

> [U]nder either the across-the-board exhaustion approach or the mixed-claim approach adopted by courts of appeals recognizing a futility exception to § 1997e(a), Nyhuis's action, as pleaded, is barred because of his failure to exhaust his available administrative remedies. That said, we are of the opinion that § 1997e(a), as amended by the PLRA, completely precludes a futility exception to its mandatory exhaustion requirement. Therefore, we will affirm the District Court's judgment not on the ground that the futility exception was not applicable in *this* case, but on the ground that it is not applicable in *any* case.

Id. at 71. With respect to the meaning of "available remedies," the court of appeals concluded that, "by leaving the word 'available' in § 1997e(a) Congress merely meant to convey that if a prison provided no internal remedies, exhaustion would not be required." *Id.* at 73.

In *Booth*, the court of appeals adopted the *Nyhuis* rule for state prisoners, concluding that "the *Nyhuis* rule has even greater force with respect to § 1983 actions," because of both the "additional comity considerations" and the "additional federalism and efficiency considerations" that obtain in the § 1983 context. 23a. The court thus held that, "because Booth 'failed . . . to exhaust his available administrative remedies (rather than those he believed would be effective)' before filing his § 1983 action, the District Court appropriately dismissed his action without prejudice." *Id.* (quoting *Nyhuis*, 204 F.3d at 78) (omission in original).

SUMMARY OF ARGUMENT

This case calls upon the Court to determine whether, in requiring prisoners to exhaust "such administrative remedies as are available" prior to bringing actions with respect to prison conditions, Congress intended to negate the fundamental principle that, "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

The plain language of § 1997e(a) shows no such intent. Rather, it shows the opposite. Congress chose to require prisoners to exhaust only "such administrative remedies as are available." The ordinary meanings of "remedy" and "available" demonstrate that Congress intended to require prisoners to exhaust only those prison grievance procedures that actually could provide a remedy for the violation of their rights. Where, as here, a prisoner seeks monetary damages to remedy a past wrong, and the prison grievance procedure cannot provide such damages, there is no "remed[y] . . . available," and the prisoner may seek relief directly in federal court.

This conclusion is confirmed by fundamental administrative law principles, within which Congress was legislating when it chose the words "such administrative remedies as are available." Those principles make clear that litigants need exhaust only those administrative procedures that can provide a remedy for their claims. Further, where an administrative procedure cannot provide such a remedy, the principles underlying the exhaustion requirement are not served by forcing the party to engage in an exercise in futility. And in the prisoner exhaustion context in particular, in view of the short, successive time

frames of the prison grievance procedure and the concomitant high likelihood of forfeiture, requiring exhaustion not only may be futile, but actually may be fatal to the prisoner's claim.

Although resort to legislative history is unnecessary given the plain language of § 1997e(a), the legislative history of prisoner exhaustion requirements confirms that Congress intended to require exhaustion only where the grievance procedures could provide the remedy the prisoner sought. In the 1996 amendments to § 1997e(a), part of the Prison Litigation Reform Act ("PLRA"), Congress deleted certain words, but, rather than adopting a blanket exhaustion requirement, retained the key phrase ("such administrative remedies as are available") that is directed to the substantive efficacy of the administrative process. Moreover, shortly before it amended § 1997e(a) to its present form, Congress declined to enact another bill that would have required federal prisoners to exhaust administrative procedures even when those procedures could not provide the remedy they sought. Further, Congress's intent in the PLRA to reduce frivolous prisoner litigation is not served by reading § 1997e(a) to require the pursuit of futile administrative remedies.

This Court should reverse the court of appeals and hold that § 1997e(a) does not require prisoners to pursue administrative procedures that cannot afford them a remedy to redress the wrongs of which they complain.

ARGUMENT

SECTION 1997e(a) DOES NOT REQUIRE A PRISONER WHO SEEKS ONLY MONETARY DAMAGES TO EXHAUST ADMINISTRATIVE REMEDIES WHERE MONETARY DAMAGES ARE NOT AVAILABLE UNDER THE APPLICABLE ADMINISTRATIVE PROCEDURE.

Because Pennsylvania's prison grievance procedures at the time did not permit prisoners to recover monetary damages, Mr. Booth was not required to exhaust those procedures prior to bringing his federal court action seeking money damages for the violation of his rights caused by past conduct of the prison guards.[7]

Simply as a matter of common sense, it seems evident that in enacting 42 U.S.C. § 1997e(a), Congress did not intend to require a prisoner to pursue a claim through a prison grievance procedure when the remedy that can redress the wrong done to the prisoner cannot possibly be obtained through that procedure. This conclusion is confirmed by: (1) the plain language of 42 U.S.C. § 1997e(a), which requires a prisoner to exhaust only such "remedies" as are "available"; (2) well-established principles of administrative law, under which Congress was legislating when it chose to use the words "available" and "remedies," which require exhaustion only of those

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[7] Mr. Booth initially sought both injunctive relief and money damages. However, his injunctive claims are moot, since he was, in fact, transferred from Smithfield. Accordingly, the case is now solely a damages case. Moreover, his injunctive claims are separate from his damage claim for the violation of his rights as a result of the past assaults, and could not have remedied that violation.

administrative procedures that can provide the relief sought; and (3) the legislative history of prisoner exhaustion requirements.

I. THE PLAIN LANGUAGE OF 42 U.S.C. § 1997e(a) SHOWS THAT CONGRESS INTENDED TO REQUIRE A PRISONER TO EXHAUST ONLY THOSE ADMINISTRATIVE PROCEDURES THAT CAN PROVIDE THE REMEDY THAT THE PRISONER SEEKS.

The court of appeals concluded that because a procedural avenue existed for prisoners to obtain certain relief, exhaustion was "mandatory," even though the prison grievance system could not "provide the inmate-plaintiff with the relief he says he desires in his federal action." 22a. This conclusion flies in the face of the applicable statutory language.

"When interpreting a statute, we look first and foremost to its text." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). The plain text of the statute at issue here requires the exhaustion only of "such administrative remedies as are available." When a prison grievance system offers no monetary damages, there is no remedy available to a prisoner who, like Mr. Booth, seeks monetary damages for an injurious physical assault. Thus, the § 1997e(a) exhaustion requirement does not apply.

A. The Plain Language of § 1997e(a) Requires a Prisoner to Exhaust Only Such "Remedies" As Are "Available" and an Administrative Procedure That Cannot Provide the Requested Relief Is Not a "Remedy" That Is "Available."

This Court need look no further than the text of § 1997e(a) to conclude that Mr. Booth was not required to pursue his claim for money damages for past conduct through the Pennsylvania grievance procedure, where that procedure could not provide him such relief. When there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

The exhaustion requirement in § 1997e(a) provides that:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until *such administrative remedies as are available* are exhausted.

42 U.S.C. § 1997e(a) (Supp. II 1996) (emphasis added).

The courts of appeals that have held that § 1997e(a) does not require exhaustion when the remedy that the prisoner seeks is not available properly have based their holdings on the plain language of the statute. *See, e.g., Rumbles v. Hill*, 182 F.3d 1064, 1067 (9th Cir. 1999) (where

administrative grievance process "does not allow for monetary damages, [that] form of relief does not constitute an 'available' remedy that must be exhausted before bringing a section 1983 action"), *cert. denied*, 528 U.S. 1074 (2000); *Whitley v. Hunt*, 158 F.3d 882, 886 (5th Cir. 1998) (plain meaning of § 1997e(a) does not require exhaustion of unavailable remedies); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) ("[A] prisoner can only exhaust administrative remedies that are actually available.").

The plain language of the statute establishes that these courts are correct. The text of § 1997e(a) requires prisoners to exhaust only "such administrative remedies as are available." While not defined in the statute, the ordinary meaning of the terms "remedies" and "available" shows Congress's intent to require prisoners to pursue only those administrative remedies that are capable of providing them the relief they seek. "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). There is always a "strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Ardestani v. INS*, 502 U.S. 129, 136 (1991) (internal quotation omitted); *see also Artuz v. Bennett*, 121 S. Ct. 361, 363-64 (2000).

The ordinary meaning of the term "remedy" shows that there can be no remedy in the absence of a mechanism for obtaining the relief desired. "Remedy" is defined as "the legal means to recover a right or to prevent or obtain redress for a wrong." *Webster's Third New International Dictionary* 1920 (1993); *see also Black's Law Dictionary* 1294 (6th ed. 1990) (defining "remedy" as "[t]he means by which a right is enforced or the violation

of a right is prevented, redressed, or compensated"). Pennsylvania's grievance procedure did not provide a remedy for Mr. Booth because it could not provide him with a legal means to "recover a right" or to "prevent or obtain redress" for a wrong. A procedure is not a "remedy" for a particular legal right unless it permits enforcement of that right; and it is not a "remedy" for a particular type of wrong unless it provides redress for that wrong. There was, quite simply, nothing that the Pennsylvania grievance system could have done to give Mr. Booth the monetary compensation he claimed for the injuries he suffered.

The term "available," in turn, is defined as "having sufficient power or force to achieve an end," "capable of use for the accomplishment of a purpose," and "that is accessible or may be obtained." *Webster's Third New International Dictionary* 150 (1993); *see also Black's Law Dictionary* 135 (6th ed. 1990) (defining "available" as "accessible; obtainable; present or ready for immediate use"). But, of course, under the Pennsylvania grievance procedure, there was no remedy "capable" or "ready for immediate use" to redress the wrongs done to Mr. Booth, nor "accessible" to him so that he might recover for the violation of his rights. Only a monetary damages remedy could afford this relief, but this was not an administrative remedy that was "available" to Mr. Booth.

In short, when a prisoner seeks monetary damages to recover for a past violation of his or her constitutional rights, as Mr. Booth does, there are no claims he or she could state that the Pennsylvania grievance procedure could redress. Thus, no "available remedy" exists, and, by its plain terms, § 1997e(a) is not applicable.

This conclusion is confirmed by this Court's decisions in which it has used the phrase "available remedy" to describe a mechanism that actually can provide the relief sought, not simply as any mechanism for relief that may exist. It is against this background that the Court should evaluate Congress's meaning of the term "available remedies." "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911).

For example, in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), a locomotive fireman claimed that his union and employer had violated the Railway Labor Act by agreeing to exclude black railway workers from fireman positions. The questions presented were whether the Railway Labor Act imposed a duty of fair representation on the union – which would be violated by the discriminatory practice of the union – and whether the courts had jurisdiction to remedy such a violation. *See id.* at 193-94. After answering the first question in the affirmative, *see id.* at 202-03, the Court turned to the question whether the Act divested federal and state courts of jurisdiction to enforce the duty of fair representation.

In undertaking this analysis, the Court focused on whether the Adjustment Board, which heard disputes between rail carriers and their employees, could provide the plaintiff the "relief here sought" – injunctive, declaratory, and monetary remedies to prevent the continuation of the discrimination. *Id.* at 205. The Court concluded that, in fact, the Adjustment Board had "consistently

declined" to grant such relief. *Id.* Accordingly, although the plaintiff might "resort to such proceedings in order to secure a possible administrative remedy," because of the Board's prior refusal to grant the relief sought, there was not "an administrative remedy available" and the plaintiff could bring his claim directly in court. *Id.* at 206-07.[8]

Similarly here, while Mr. Booth could resort to the Pennsylvania prison grievance proceedings, there "is no

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[8] In other contexts, this Court consistently has used the term "available remedy" to describe the specific relief sought by, and available to, a plaintiff – and not simply as a general procedure that might provide some other type of relief. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998); *Lane v. Pena*, 518 U.S. 187, 197-99 (1996); *United States v. Burke*, 504 U.S. 229, 238 (1992); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983); *cf. United States v. Testan*, 424 U.S. 392, 403 (1976) (noting that an "administrative avenue" of relief was "available" to plaintiffs, but "the remedy of money damages" was not "available").

In *West v. Gibson*, 527 U.S. 212 (1999), this Court reviewed the court of appeals' determination that "the EEOC lacked the legal power to award compensatory damages; consequently there was no administrative remedy to exhaust," when a federal employee sought only compensatory damages from his employer under Title VII. *Id.* at 217. This Court vacated that decision on the ground that the EEOC did indeed have the authority to order a federal agency to pay money damages to a federal employee bringing a Title VII claim. *See id.* at 223. Nonetheless, it is noteworthy that neither the Court majority nor the four dissenting Justices (who concluded that the EEOC had no such authority) questioned the court of appeals' commonsense conclusion that, where monetary damages are not available from an administrative agency, the statutory requirement that a claimant exhaust administrative remedies does not apply, as there would be "no administrative remedy to exhaust." *Id.* at 217.

available administrative remedy" for him there, because the prison system cannot award monetary damages. Thus, Mr. Booth's claim falls outside the intended scope of § 1997e(a).[9]

B. Congress's Choice of the Words "Available Remedy" Should Be Given Full Effect in Interpreting § 1997e(a).

Despite the well-accepted meaning of the phrase "available remedy," the courts of appeals that have required exhaustion of futile procedures (including the court below), have read the phrase to mean simply that some administrative procedure is in existence in the prison. *See, e.g., Nyhuis,* 204 F.3d at 73; *Alexander v. Hawk,* 159 F.3d 1321, 1326-27 (11th Cir. 1998). This construction of the words "available remedy" not only is contrary to their plain meaning, but also renders the words superfluous and is belied by the text of the very next section of the statute.

In the 1996 amendments to § 1997e(a), while Congress removed certain words (discussed *infra* Part III.A), it retained the key words – "such administrative remedies

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[9] This conclusion is supported by Congress's limitation in § 1997e(a) to "action[s] . . . with respect to prison conditions." The term "prison conditions" commonly refers to ongoing conditions of confinement that a prison grievance system could remedy, not to an isolated incident (or incidents) of abuse for which damages are the only remedy. *Cf. Hudson v. McMillian,* 503 U.S. 1, 9 (1992) (distinguishing between conditions-of-confinement and excessive force claims).

as are available." Had Congress intended to require prisoners to exhaust all administrative procedures in place, without regard to whether those procedures are "available remedies" that can redress the specific wrong done to the prisoner, Congress could have amended the statute to require exhaustion of "all administrative procedures." Instead, Congress was more circumscribed, choosing to limit the exhaustion requirement to "such administrative remedies as are available."

Of course, there would have been no need for Congress to include the qualifier "available remedy" if Congress meant simply to require prisoners to pursue all grievance procedures in existence. Indeed, reading § 1997e(a) simply to state the obvious, *i.e.*, that prisoners need not pursue administrative grievance procedures when no such procedures exist, renders the terms "remedies" and "available" superfluous. However, courts have an "interpretive obligation to try to give meaning to all the statutory language." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 526 U.S. 434, 452 (1999); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998) ("The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.").

Moreover, this reading would ignore the actual language chosen by Congress, instead making the statute read, "No action shall be brought with respect to prison conditions . . . until such administrative *procedures* as *exist* are exhausted" – rather than, "until such administrative *remedies* as *are available* are exhausted." This result is contrary to this Court's consistent command that courts

give meaning to the words actually chosen by Congress, not to those that Congress could have, but did not, use. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947-48 (2000); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991); *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951).

Congress's deliberate decision to require exhaustion only of "available remedies," and not of "existing procedures," is further indicated by its use of the term "administrative procedures" in the very next section of the statute, 42 U.S.C. § 1997e(b) (Supp. II 1996). That section provides, "[t]he failure of a State to adopt or adhere to an *administrative grievance procedure* shall not constitute the basis for an action under section 1997a or 1997c of this title." *Id.* (emphasis added). This provision precludes the Attorney General of the United States from taking certain actions on the basis of a state's failure to "adopt or adhere to an administrative grievance procedure." In doing so, subsection (b) focuses on a state's entire "administrative . . . procedure," as opposed to the specific "administrative remedies" that may be available through that procedure. Because an Act of Congress "should not be read as a series of unrelated and isolated provisions," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), Congress's deliberate choice of different words in the related subsections of § 1997e should be given full effect, and they can be given full effect only if "available remedy" is interpreted to mean just that.

This conclusion follows a fundamental rule of statutory construction: when Congress uses certain language in one part of a statute, and different language in another, the difference is intentional, and indicates Congress's

intent that the words have different meanings. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Hohn v. United States*, 524 U.S. 236, 250 (1998); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). *See generally* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 194 (6th ed. 2000). Yet, that is precisely what the courts holding that prisoners must exhaust futile grievance procedures have done: ascribe the same meaning to the terms "remedy" and "procedure," despite Congress's decision, in the same enactment, to use the two different words in two related subsections of § 1997e.

* * *

In short, the mere fact that Pennsylvania has a prison grievance procedure in place to redress certain types of wrongs and to provide certain types of relief does not mean that Mr. Booth has an "available remedy" to redress the particular wrong done to him and to provide relief for that wrong. While an administrative procedure exists in Pennsylvania that may offer a remedy for some wrongs, it is not capable of remedying the wrong of which Mr. Booth complains nor of providing him the relief he seeks for that wrong. Therefore, there is no "available remedy" and Mr. Booth may bring his claim directly in federal court.

II. WELL-ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW CONFIRM THAT CONGRESS INTENDED TO REQUIRE A PRISONER TO EXHAUST ONLY THOSE ADMINISTRATIVE PROCEDURES THAT CAN PROVIDE THE REMEDY THAT THE PRISONER SEEKS.

The reading of § 1997e(a) that requires a prisoner to exhaust only those administrative procedures that actually can redress the wrong not only accords with the plain language of the statute, but also is consistent with well-established administrative law principles, as well as with the purposes of administrative exhaustion. This Court has made clear that litigants need exhaust only those administrative procedures that can provide a remedy for their claims. Congress was no doubt aware of these traditional legal concepts when it enacted § 1997e(a), and, of course, "Congress will be presumed to have legislated against the background of [the Court's] traditional legal concepts." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978).

Had Congress intended to alter the well-established administrative law principles discussed below, it would have chosen words to effectuate that intent. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.' " (citation omitted)). Instead, Congress did the opposite: it chose words that reflect and affirm the long-standing principles, which, accordingly, are instructive in

confirming Congress's intent not to require exhaustion where exhaustion would be futile.[10]

A. Administrative Law Jurisprudence Makes Clear That Litigants Need Exhaust Only Those Administrative Procedures That Can Provide a Remedy for Their Claims.

The plain language of § 1997e(a) affirms the long-standing principle of administrative law that exhaustion is not required when exhaustion would be futile – in other words, when the agency to which the litigant must apply for relief has "no power to decree [the] relief." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993). As this Court made clear in *Reiter*:

> Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed. That doctrine is inapplicable to petitioners' reparations claims, however, *because the*

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[10] In fact, while resort to legislative history for this principle is unnecessary, it is noteworthy that the Department of Justice described the amendments to § 1997e as having the effect of bringing that statute's exhaustion requirement "more into line with administrative exhaustion rules that apply in other contexts – by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted." *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 20-21 (1995) (statement of John R. Schmidt, Associate Attorney General, U.S. Department of Justice).

ICC has long interpreted its statute as giving it no power to decree reparations relief.

Id. (emphasis added) (citations omitted).

This Court has affirmed this basic principle on numerous other occasions. For example, in *McNeese v. Board of Education*, 373 U.S. 668, 670 (1963), the lower courts had dismissed a civil rights suit challenging segregation in an Illinois school district on the ground that the plaintiffs had failed to exhaust their state administrative remedies. This Court reversed, finding it doubtful that "Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights," because the Superintendent of Public Instruction could only "investigate, recommend and report" and could "give no remedy." *Id.* at 674-75.

Later, in *Clayton v. International Union, UAW*, 451 U.S. 679 (1981), the Court addressed whether an employee alleging that his union violated its duty of fair representation was required to exhaust internal union procedures before bringing a claim in court under section 301 of the Labor Management Relations Act. This Court held that exhaustion was not required because the employee could not obtain "the substantive relief he seeks," and thus, "exhaustion would be a useless gesture." *Id.* at 693. While the Court acknowledged that "a requirement that aggrieved employees exhaust internal remedies might lead to nonjudicial resolution of some contractual grievances," it "decline[d] to impose a universal exhaustion requirement lest employees with meritorious § 301 claims be forced to exhaust themselves and their resources by

submitting their claims to potentially lengthy internal union procedures that may not be adequate to redress their underlying grievances." *Id.* at 689.

Similarly, in *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399 (1988), the Court did not require plaintiffs to include their challenge to federal regulations in their initial application for Medicare payments because the applicable administrative entity was "without power" to entertain a challenge to the Secretary's regulations, and, accordingly, "any attempt to persuade the intermediary to do otherwise would be futile." *Id.* at 404. In so holding, the Court made clear that the law does not require parties to follow a "futile" path, and that failure to do so does not constitute the "bypass [of] a clearly prescribed exhaustion requirement." *Id.* at 405.[11]

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[11] *See also Bowen v. City of New York*, 476 U.S. 467, 485 (1986) (noting that exhaustion was "futile" and "there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise," when the agency could not grant the relief sought by the plaintiff); *Smith v. Robinson*, 468 U.S. 992, 1019 n.22 (1984) ("[T]he presumption in a case involving a claim arguably within the [Education of the Handicapped Act] should be that the plaintiff is required to exhaust EHA remedies, unless doing so would be futile."); *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (holding that a "hearing," required by statute, was not necessary before a final administrative decision was made because such a hearing would be "futile and wasteful"); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (per curiam) (holding that it "would be to demand a futile act" if the Court required exhaustion of internal prison remedies by a prisoner seeking return of legal materials confiscated by authorities who had conceded that such materials would not be returned); *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 505 (1928) (holding that

Similarly here, Mr. Booth's failure to pursue Pennsylvania's prison grievance system, where the prison authorities were "without power" to offer him the appropriate remedy, does not constitute a "bypass" of the exhaustion requirement. In limiting the exhaustion requirement to "such administrative remedies as are available," Congress legislated in accordance with well-established administrative principles that show that Mr. Booth's claim does not fall within that requirement.

B. The Policies Underlying the Administrative Exhaustion Requirement Reinforce the Conclusion That a Prisoner Seeking Only Monetary Damages Is Not Required To Exhaust Administrative Procedures That Cannot Provide Such Damages.

In addition to well-established administrative law principles, the purposes underlying the exhaustion requirement confirm that § 1997e(a) does not require a prisoner to exhaust grievance procedures that cannot provide the relief sought. Congress can be presumed to have intended that the exhaustion requirement in § 1997e(a) would serve the traditional purposes of administrative

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plaintiff need not exhaust state remedies because a prior state supreme court decision "would have rendered any such application utterly futile" since the local administrative board "was powerless to grant any appropriate relief in the face of that conclusive decision"); *cf. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 167 (1946) (declining to require a litigant to comply with "a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it").

exhaustion. The fact that those purposes would be ill-served by requiring a prisoner to exhaust futile procedures further shows that Congress did not intend for prisoners to exhaust grievance procedures that are incapable of providing relief.

This Court has identified two primary purposes of administrative exhaustion requirements: to protect the authority of the administrative agency and to promote judicial efficiency. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also McKart v. United States*, 395 U.S. 185, 194 (1969);[12] *cf. Nyhuis*, 204 F.3d at 75-78. It was these purposes that served as a primary underpinning of the court of appeals' decision in *Nyhuis*. However, neither of these purposes is served by requiring a prisoner seeking

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[12] This Court has invoked the policies outlined in *McKart* many times, including in contexts such as this one involving an express statutory exhaustion requirement. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court considered the Social Security Act's strict exhaustion requirement, which precluded claimants from bringing any court action prior to the issuance of a "final decision" by the administrative agency. *See id.* at 756-57 & nn.4-5 (citing 42 U.S.C. § 405(g), (h)). The Court, citing *McKart*, described the principal policies behind exhaustion, *see id.* at 765, and determined that, despite the fact that a hearing had not taken place and no final decision had been issued, the named plaintiffs sufficiently had met the exhaustion requirements under the circumstances of their case, as further adherence to the strict exhaustion requirement would be "futile and wasteful." *Id.* at 766-67; *see also Mathews v. Eldridge*, 424 U.S. 319, 330-31 & n.11 (1976) (noting that the administrative agency would not have been required to consider the plaintiff's claim – a Due Process challenge to the agency's review system – and that "the nature of the claim being asserted" is an important factor "in determining whether a statutory requirement of finality has been satisfied").

to recover damages for past wrongs to exhaust administrative procedures that cannot provide such redress for those wrongs. Moreover, the burden on the prisoner of having to exhaust a futile procedure greatly outweighs any benefit to the system that might arguably exist.

1. Requiring Exhaustion Would Not Protect the Prison's Authority.

First, requiring exhaustion of administrative remedies that cannot provide the relief sought would not protect the prison's authority because, where the prison has no authority to grant relief, there is nothing to protect. *Cf. McKart*, 395 U.S. at 195 (noting that exhaustion of administrative remedies gives the agency "a chance to discover and *correct* its own errors," and, relatedly, that a litigant "may be successful in *vindicating his rights* in the administrative process" (emphasis added)). This policy does not apply when the administrative process does not offer a remedy, and so can neither "correct" nor "vindicate" a right. In such circumstances, the governmental entity in effect has abdicated its authority, rendering this rationale irrelevant.

Moreover, as the Court noted in *McCarthy*, regarding the prisoner's claim of inadequate medical care, "[t]he Bureau's alleged failure to render medical care implicates only tangentially its authority to carry out the control and management of the federal prisons." *McCarthy*, 503 U.S. at 155. Similarly here, Mr. Booth seeks monetary damages to compensate him for past injuries inflicted on him by prison guards. The prison authorities to whom Mr. Booth must submit his grievances have neither expertise nor

authority in the area of awarding damages for intentional abuse that would justify exhaustion of unavailable remedies. *See id.* ("[T]he Bureau does not bring to bear any special expertise on the type of issue presented for resolution here.").

2. Requiring Exhaustion Would Not Promote Judicial Efficiency.

Nor is the goal of judicial efficiency served by requiring the exhaustion of futile procedures. The courts have identified two general ways in which exhaustion of administrative remedies might promote judicial efficiency: (1) the administrative agency might be able to offer relief that would obviate the individual's need to seek judicial redress; and (2) even if the individual still brings a lawsuit, a factual record will have been developed in the administrative process that will facilitate and expedite the judicial process. *See, e.g., McKart*, 395 U.S. at 194-95; *Nyhuis*, 204 F.3d at 76. Neither of these rationales is served by requiring a prisoner to pursue futile administrative procedures.

The first rationale is not served because there is no legitimate reason why a prisoner simply would drop his or her claim after going through a grievance procedure that, by definition, is incapable of addressing his or her cause of action, providing the relief sought, and remedying the wrong. Nor does the possibility that a prisoner might accept substitute relief from the prison and not pursue his or her federal claim justify requiring the exhaustion of futile procedures. Almost by definition, there is no "substitute" relief available where a procedure

is incapable of remedying a wrong. In fact, the Court rejected this very argument in *Clayton*, when it held that a plaintiff seeking reinstatement to his job did not have to exhaust administrative procedures that could not provide that remedy, even though the administrative procedures could have resulted in a settlement that might have obviated the need for the lawsuit. *See Clayton*, 451 U.S. at 689, 693.

As to the second rationale, a primary policy underlying exhaustion is to promote efficiency by having administrative bodies "develop the necessary factual background upon which decisions should be based." *McKart*, 395 U.S. at 194; *see also McCarthy*, 503 U.S. at 145. This policy, while frequently invoked throughout administrative exhaustion jurisprudence, does not apply in this situation for one very simple reason: whatever facts that may be found through Pennsylvania's grievance process are subject to strict policies precluding their use in a later court action. *See* 51Ja (providing that all proceedings under the grievance system are "inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee"). Thus, by its own terms, the grievance process is not permitted to serve any fact-finding role at all for use in later judicial proceedings.

Moreover, the policy of developing a factual background is at odds with the unique structure of prison grievance systems. In the typical non-prison administrative procedure, the development of facts is an integral part of the process and the facts so found by the administrative body are given great (if not conclusive) weight in a later court proceeding. *See, e.g.*, 42 U.S.C. § 405(g) (1994)

("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . . "). By contrast, to the extent that any factual investigation does occur in the prison context, there is little assurance that the facts so developed will be accurate or impartial. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (noting that members of a prison disciplinary committee are not independent, their findings may be influenced by the fact that their decisions are reviewed by their superiors, and the "credibility determination they make often is one between a co-worker and an inmate").

Some courts have expressed an additional judicial efficiency concern specifically in the prison exhaustion context: that allowing a prisoner who cannot obtain the relief he or she seeks to proceed directly to federal court will encourage other prisoners to frame their complaints in similar fashion just to avoid the exhaustion requirement. *See, e.g., Nyhuis*, 204 F.3d at 74; *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537 (7th Cir. 1999); *Alexander*, 159 F.3d at 1326. However, this concern ignores the fact that state legislatures and prison authorities have complete control over the remedies that are available to those with injuries or grievances within their prison systems. Any supposed "loophole" in the exhaustion requirement – really just a plain reading of the requirement that prisoners exhaust only available remedies – easily can be closed by making monetary damages available in the grievance procedure, which is, in fact, precisely what the Commonwealth of Pennsylvania subsequently did. *See* 60Ja.

In addition, even if a prison system does not offer monetary relief, many forms of relief that a prisoner might seek, such as a transfer to a new prison or cell block, would be available through the prison grievance system and exhaustion of such remedies therefore would be required. Changing the nature of their complaints to ask for money damages will allow prisoners to avoid the exhaustion requirement only at the cost of forgoing the actual relief they desire.

3. The Burden on the Prisoner of Having To Exhaust Unavailable Remedies Outweighs Any Benefit to the Federal Courts of Requiring Exhaustion.

In contrast to the lack of benefit to either the prison or the courts, requiring that a prisoner exhaust unavailable remedies "heavily burdens the individual interests of the petitioning inmate." *McCarthy*, 503 U.S. at 152. First, there is a grave risk that a prisoner, typically proceeding without counsel or other legal assistance, will miss one of the short deadlines (as short as five days in Pennsylvania) for filing a complaint or an appeal under the prison grievance system, thereby risking dismissal of a later-filed federal suit for failure fully to exhaust administrative remedies (despite the unavailability of the relief sought by the prisoner). *See id.* at 152-53. As the Court in *McCarthy* aptly noted, the combination of short, successive filing deadlines and the inability of the prison to grant monetary damages "means that the prisoner seeking only money damages has everything to lose and nothing to gain from being required to exhaust his claim under the internal grievance procedure." *Id.* at 152.

Second, while Mr. Booth's complaint was dismissed *without prejudice* for failure to exhaust, such a dismissal effectively may be a dismissal with prejudice, as the prisoner likely will have missed the short deadline for filing a grievance at that point, and, accordingly, may never be able to cure the defect. *See, e.g.*, 8a n.3 ("[B]oth parties agree that the time is long past for Booth to pursue his normal administrative remedies; therefore, he cannot cure the defect in his complaint on which the District Court based its dismissal."). In fact, one court explicitly has held that such a dismissal is with prejudice, creating a permanent barrier to relief for the relevant injury. *See Underwood v. Wilson*, 151 F.3d 292, 296 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999). Thus, requiring exhaustion of unavailable remedies not only fails to serve the purposes of administrative exhaustion, but also is extremely burdensome on prisoners seeking redress for violations of their rights that cannot be remedied by prison grievance procedures.

* * *

None of the policies underlying exhaustion in general, nor the specific policies in favor of requiring prisoner litigants to exhaust prison remedies, is implicated when the administrative procedures at issue cannot provide the only remedy that the prisoner seeks. Together with the statute's plain language, as well as the administrative law background against which Congress was legislating when it adopted that language, consideration of these policies confirms that Congress did not intend to require prisoners to pursue remedies for injuries that prison authorities are unable to redress.

III. THE LEGISLATIVE HISTORY OF PRISONER EXHAUSTION REQUIREMENTS CONFIRMS THAT CONGRESS INTENDED TO REQUIRE A PRISONER TO EXHAUST ONLY THOSE ADMINISTRATIVE PROCEDURES THAT CAN PROVIDE THE REMEDY THAT THE PRISONER SEEKS.

Given the plain text of § 1997e(a), it is not necessary to resort to legislative history in order to attempt to glean Congress's intent. *See United States v. Gonzales*, 520 U.S. 1, 6 (1997). Nonetheless, the legislative history of prisoner exhaustion requirements supports the view that Congress intended to require exhaustion only where the administrative remedy can provide the relief sought.

A. Congress's Deletion of the Phrase "Plain, Speedy, and Effective" from § 1997e(a) Was Intended To Eliminate Federal Oversight of State Prison Grievance Procedures, Not To Require a Prisoner To Exhaust Futile Remedies.

Many of the courts that require a prisoner to exhaust prison grievance procedures that cannot provide the monetary damages that the prisoner seeks base their holdings on Congress's deletion in the Prison Litigation Reform Act of 1995 ("PLRA"),[13] of the requirement that, prior to bringing a federal lawsuit, prisoners exhaust "such plain, speedy, and effective administrative remedies as are available," 42 U.S.C. § 1997e(a)(1) (1994),

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[13] Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 to -77 (1996).

and insertion in its stead the requirement that prisoners exhaust "such administrative remedies as are available." *See, e.g., Nyhuis*, 204 F.3d at 72-73; *Perez*, 182 F.3d at 537; *Alexander*, 159 F.3d at 1326. These courts reason that the elimination of the words "plain, speedy, and effective" indicates "that Congress no longer wanted courts to examine the effectiveness of administrative remedies." *Alexander*, 159 F.3d at 1326. In addition to ignoring the plain meaning of the statute, this approach misapprehends both the pre-amended statute and the purpose and effect of the 1996 amendment.

The pre-amended statute provided in subsection (a)(1) that courts had the *discretion* to require prisoners to exhaust "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1) (1994). The statute further provided that exhaustion could not be required unless the administrative remedies were certified to be "in substantial compliance with the minimum acceptable standards promulgated [by the Attorney General] or [were] otherwise fair and effective." *Id.* § 1997e(a)(2).

Subsection (b)(1), in turn, required the Attorney General to promulgate minimum standards "for the development and implementation of a plain, speedy, and effective system for the resolution of grievances." *Id.* § 1997e(b)(1). As enumerated in subsection (b)(2), those minimum standards were to include solely procedural requirements and did not require prison systems to make available any

particular substantive remedy.[14] Accordingly, review of the pre-amended statutory scheme indicates that Congress intended the words "plain, speedy, and effective" in the former statute – the words it eliminated in the 1996 amendments – to refer to the fairness and efficacy of the

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[14] The former § 1997e(b)(2) provided that the "minimum standards" promulgated by the Attorney General "shall provide":

> (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;
>
> (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
>
> (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
>
> (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and
>
> (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

42 U.S.C. § 1997e(b)(2) (1994) (emphasis added).

The first minimum standard under § 1997e(b)(2) relates to the requirement that the procedure be "plain" and "fair." The second and third standards relate to whether the grievance procedure is "speedy." The last two standards relate to whether the procedures are "effective" because a system that does not attempt to prevent reprisals or require independent review would not likely be effective in hearing inmate grievances.

procedural aspects of the administrative remedy, whereas, in contrast, Congress intended the words "such administrative remedies as are available" – the words it preserved – to refer to the substantive aspect of whether the remedy could provide the relief sought.[15]

In other words, what Congress eliminated when it amended § 1997e(a) in 1996 was the requirement, created by former § 1997e(a)(1)'s plain language and the detailed provisions of former § 1997e(b)(2), that an administrative remedy be available through "plain, speedy, and effective" procedures. What it did not eliminate was the requirement that the remedy be available at all. Prisoners may no longer avoid administrative procedures on the ground that they are slow, unfair, or ineffective, as long as the procedures can provide the remedy that the prisoner seeks. This is the "real and substantial effect" of

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[15] This Court's observation in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), concerning Congress's intent in tying the discretionary exhaustion requirement of § 1997e(a) to the certification procedures, is particularly instructive in this regard:

> Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. To further this purpose, Congress provided for the deferral of the exercise of federal jurisdiction over certain § 1983 claims only on the condition that the state prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

Id. at 511-12 (citations omitted).

Congress's amendment, not the unprecedented (and illogical) requirement that prisoners exhaust remedies that cannot possibly give them the relief they seek or provide redress for the wrong inflicted upon them. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

B. Congress's Rejection of Language That Would Have Required Exhaustion Regardless of the Remedy Sought Confirms That Congress Did Not Intend To Require a Prisoner To Exhaust Futile Remedies.

As discussed above, had Congress intended the words "available" and "remedies" to mean something other than their plain meaning, and had Congress meant to reverse established administrative exhaustion jurisprudence, it would have done so explicitly. But what the legislative history shows is that, not only did Congress not do so, but shortly before enacting the amendments to § 1997e(a) in 1996, it expressly rejected other legislation that would have required federal prisoners to exhaust all grievance procedures, regardless of whether those procedures could provide the relief sought.

Prior to the enactment of the PLRA, Representative LoBiondo introduced the Prisoner Lawsuit Efficiency Act of 1995 ("PLEA"). This bill would have amended title 18 of the United States Code to require federal prisoners (who were not then covered by § 1997e(a)) to exhaust available administrative procedures, with the caveat that even procedures not providing all possible forms of

recovery were required to be pursued. The proposed section was as follows:

> No action shall be brought in any court, by a prisoner in the custody of the Federal Bureau of Prisons, concerning any aspect of such prisoner's incarceration until any administrative remedy procedures available are exhausted. This section applies to all actions regardless of the nominal party defendant. *The fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them.*

Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. § 4048 (emphasis added).

Congress's failure to adopt this broad exhaustion requirement implies that it was unwilling to require a prisoner to exhaust every administrative procedure available, without regard to whether that procedure could provide the forms of recovery sought in the federal action. Instead, when it amended § 1997e(a), Congress chose to require state and federal prisoners to exhaust only "such administrative remedies as are available." *Cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").[16]

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[16] Interestingly, the only piece of PLRA legislative history directly on point is a statement of Representative LoBiondo, in which he expressed his displeasure with this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), not to require

C. The Purpose of the PLRA Is Not Served By Requiring Exhaustion Where the Administrative Procedure Cannot Provide the Remedy That the Prisoner Seeks.

It is undisputed that a driving concern prompting the enactment of the PLRA was the growing number of prisoner civil rights lawsuits, and that the amendment to § 1997e(a) was part of Congress's efforts to curb this trend. However, the words of Senator Kyl of Arizona, a co-sponsor of the bill, are instructive, in that they indicate that Congress intended that the exhaustion requirement apply only where the prison grievance system could provide a remedy that is adequate for the prisoner's claim. Senator Kyl stated:

> Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an *adequate* remedy.

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exhaustion where a federal prisoner sought monetary damages that could not be obtained through the prison grievance process. After referring to his own proposal (the PLEA, discussed *supra* in the text), Representative LoBiondo then expressed his belief that the PLRA "will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to [an] administrative remedy process before proceeding to court." 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo). The fact that Congress did not enact Representative LoBiondo's own, more expansive version of the exhaustion requirement provides at least some evidence that Congress not only did not share Representative LoBiondo's intent, but affirmatively rejected the extreme exhaustion position that he espoused.

141 Cong. Rec. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl) (emphasis added).

Moreover, the PLRA's legislative history reveals that, while Congress certainly wanted to reduce prisoner litigation in general, a primary concern was to reduce frivolous prisoner lawsuits. *See, e.g.*, 141 Cong. Rec. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (stating that the PLRA "addresses the flood of frivolous lawsuits brought by inmates"); *see also id.* at S14626-27 (citing specific examples of frivolous lawsuits). Section 1997e(a) does little, if anything, to effectuate this specific intent.

A number of specific provisions in the PLRA give federal courts the authority to dismiss frivolous prisoner cases quickly and permanently. One of these, 42 U.S.C. § 1997e(c) (Supp. II 1996), permits a district court to dismiss a case as frivolous, malicious, or for failure to state a claim, "without first requiring the exhaustion of administrative remedies." Significantly, this provision permits a district court to dismiss a case even before it considers the exhaustion issue, rendering § 1997e(a) unnecessary as a tool to reduce frivolous lawsuits.[17]

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[17] Other portions of the PLRA directed to reducing frivolous prisoner litigation include 28 U.S.C. § 1915(g) (Supp. II 1996) (precluding prisoners from bringing suits *in forma pauperis* after they have had three or more cases dismissed as frivolous, malicious or for failure to state a claim); *id.* § 1915(e)(2)(B) (providing that the district court "shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious [or] (ii) fails to state a claim on which relief may be granted"); *id.* § 1915A (requiring the district court to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in

Because frivolous or factually meritless lawsuits can be dismissed without district courts even addressing the exhaustion issue, § 1997e(a) does not serve that purpose.

* * *

The legislative history of prisoner exhaustion requirements supports what the plain language of the statute mandates – that § 1997e(a) requires prisoners to exhaust only those procedures that can provide a remedy for the wrong. Congress deleted in § 1997e(a) the words "plain, speedy, and effective" that were directed to the procedural efficacy of prison grievance procedures and preserved the words "such administrative remedies as are available" that were directed to substantive efficacy; it rejected a blanket exhaustion requirement for federal prisoners; and it chose other methods to effectuate its goal of reducing frivolous prisoner litigation. Taken together with the language of § 1997e(a) and the fundamental administrative law principles within which it was adopted, this history confirms that Congress did not intend to require prisoners to exhaust futile procedures.

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which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity" and to dismiss the complaint if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted").

CONCLUSION

For the foregoing reasons, petitioner Timothy Booth respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit and remand for further proceedings under which the district court is required to consider the merits of Mr. Booth's complaint.

Respectfully submitted,

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In the Supreme Court of the United States

TIMOTHY BOOTH
Petitioner

v.

C.O. CHURNER, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1997(e), as amended by the Prison Litigation Reform Act, requires a prisoner to exhaust administrative remedies before bringing a federal action, where the prisoner seeks only monetary damages in the lawsuit and the administrative scheme does not provide for an award of such damages?

PARTIES TO THE PROCEEDING

The petitioner is Timothy Booth. The respondents are Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain W. Gardner.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 206 F.3d 289 and is reprinted in the appendix to the *petition at* 1a.[1] *The opinion of the District Court is not* reported but is reprinted at Pet. App. 36a.

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994 ed., Supp. IV). The judgment of the Court of Appeals was entered on March 7, 2000, and the petition for certiorari was filed within ninety days thereafter, on June 5, 2000.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1997e(a) (1994 ed., Supp. IV) provides that:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

The full text of Section 1997e is reprinted in the appendix to this brief at 1a.

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[1]The appendix to the petition is cited as "Pet. App. __a." The Joint Appendix is cited as "J.A. __."

STATEMENT OF THE CASE

1. This is a civil rights action by a state prisoner against four Pennsylvania prison officials. The petitioner is Timothy Booth, who at the time of the events of which he complains was imprisoned at the State Correctional Institution at Smithfield (SCI-Smithfield), in Huntingdon County, Pennsylvania. The four respondents — Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain Gardner — were all employed at the same prison. J.A. 8 (complaint). Booth complains about four incidents, which he alleges took place from April of 1996 through March of 1997. All of these incidents occurred while petitioner was housed in a segregated housing unit at SCI-Smithfield, apparently for disciplinary reasons. J.A. 17 (affidavit for show of cause for emergency preliminary injunction); J.A. 12 (initial response to grievance).

First, petitioner claims that on April 27, 1996, he was assaulted by two prison officials, neither of whom he named as a defendant in this action. As a result, his shoulder "slips in and out"; he was told that he would receive an operation on his shoulder, but has not received one. J.A. 15 (complaint); J.A. 17 (affidavit for show of cause for emergency preliminary injunction) . There are no allegations which refer to any of the respondents in connection with this incident. Second, petitioner claims that on February 6, 1997, he threw water on one of the officers who had assaulted him the preceding April. That officer handcuffed him, removed him from his cell, took him to a storage room and threw a cup of cleaning material in his face. Again, there are no allegations which

refer to any of the respondents.[2] J.A. 15 (complaint). Third, petitioner claims that the next day, February 7, he exchanged words with respondent Rikus, who shoved him into a shelf. Another officer — not named as a defendant — tightened and twisted his handcuffs and left him handcuffed for half an hour, which aggravated his shoulder injury. J.A. 15-16 (complaint). Fourth, he claims that on March 23, 1997, respondent Churner punched him in the mouth while he was being strip searched, in the presence of respondent Workensher and others. Petitioner was then placed in a choke hold and forced to the floor, where Workensher handcuffed him. After this incident, petitioner was seen by a doctor and received three stitches in his mouth. J.A. 16 (complaint), 28-29 (amendment to specific relief).[3]

The Pennsylvania Department of Corrections maintains a three-tiered Inmate Grievance System "to ensure that inmates have an avenue through which

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[2]While this February 6 incident is included in his complaint, petitioner's later filings consistently omit it, claiming instead that he was "assaulted 3 time[s]," J.A. 21, and referring to assaults which allegedly occurred on April 27, 1996, February 7, 1997 and March 23, 1997. J.A. 17 (affidavit for show of cause for preliminary injunction); J.A. 21, 23 (affidavit in support of motion to proceed in forma pauperis); J.A. 26-27 (petition to show cause for appointment of counsel, etc.).

[3]The complaint contains no allegations which refer to respondent Gardner. Pet. App. 37a.

resolution of specific problems can be sought."[4] J.A. 40; *see* Pet. App. 6a-7a n.2. *See* Commonwealth of Pennsylvania, Department of Corrections, Consolidated Inmate Grievance Review System, Policy No. DC-ADM 804 (October 20, 1994), *reprinted with amendments at* J.A. 40-61. Grievances are submitted, on a form supplied by the institution, to the Facility Grievance Coordinator within fifteen days after the events upon which the claims are based; extensions of this time may be granted for good cause. J.A. 45-46. The Grievance Coordinator forwards the grievance to an appropriate Grievance Officer, a management-level employee whose identity varies depending on the specific nature of the grievance. J.A. 41-42, 46. The Grievance Officer's investigation may include interviews of the grievant and others having personal knowledge of the matter; a grievant who has requested a personal interview "shall be interviewed." J.A. 46-47. The grievant then receives a written response, ordinarily within ten working days. J.A. 47. The grievant may appeal this initial decision, within five days, to the Facility Manager, who must in turn notify the grievant of his or her

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[4]The Inmate Grievance System is not the only review mechanism maintained by the Department of Corrections. The imposition of disciplinary sanctions and confinement in administrative custody, for example, are governed by separate procedures for administrative review and appeal. *See, e.g., Shoats v. Horn*, 213 F.3d 140, 145 (3d Cir. 2000) (describing procedures for review and appeal of administrative custody decisions). Issues governed by such procedures fall outside the scope of the Inmate Grievance System, J.A. 50; the Department's policy is that for every issue "there shall be a forum for review and an avenue for appeal, but only one." J.A. 43.

decision within ten working days. J.A. 47-48. The grievant, within seven days, may then take a final appeal to the Department's Central Office Review Committee (CORC). The CORC may require further investigation, and issues its decision within twenty-one days.[5] J.A. 42, 48-49.

An amendment to the grievance policy adopted on May 1, 1998 permits a grievant to "include a request for compensation or other legal relief normally available from a court." J.A. 60. When petitioner filed this action, however, the grievance system did not provide for monetary payments. Then as now, however, neither the prescribed grievance form, nor the governing procedures, *requires* the grievant to specify any particular relief being sought.

Petitioner concedes that he did not exhaust this grievance procedure with regard to any of the four assaults he alleges, or with regard to obtaining an operation for his shoulder. *See* Br. for Petitioner at 6 & n.4; Pet. App. 20a. As to the first and last of the alleged assaults, and the shoulder operation, there is no indication that he filed a grievance at all. As to the alleged assaults of February 6 and 7, 1997, petitioner may or may

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[5]The text describes the procedure as it existed when petitioner filed this action, and some aspects of the procedure have since changed: grievances related to medical care, which formerly followed a separate appeal procedure, are now handled in the same way as other grievances, J.A. 54-55; and final appeals are now to the Department's Chief Hearing Examiner, rather than to the CORC. J.A. 56-57.

not have filed grievances about one or both of them,[6] but if he did, he did not pursue them beyond the initial step in the process; nor is there any indication that he requested any monetary payment.

2. Petitioner filed this action in the District Court pursuant to 42 U.S.C. § 1983, using a form provided by the courts. In the space on the form marked "RELIEF," he filled in "[f]irst protective order for transfer to another prison please my safety and life is at stake order preliminary injunction." J.A. 9. In a lengthy handwritten

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[6]The record is not clear on this point. On February 19, 1997, petitioner filed a grievance saying that he had requested to see a Captain Glenny about an "assault," and "asking to be heard for this wrong," but the grievance contains no further details. J.A. 13-14 (grievance). On March 5, 1997, the Grievance Coordinator denied a grievance which petitioner filed on the same day, in which he requested protective custody, on the ground that petitioner was "already in disciplinary custody which is a very secure housing." J.A. 12 (initial response to grievance). This grievance in turn was apparently a duplicate of one filed on February 14, 1997, *ibid*, but neither of these grievances is in the record. On March 13, 1997, the Grievance Coordinator denied a grievance which petitioner filed on March 12, and which apparently made some allegation of "abuse by officers," but this grievance likewise is not in the record. J.A. 10 (initial response to grievance). Finally, petitioner filed grievances on June 21 and 23, 1997 — after the District Court had dismissed his complaint — in which he refers to three of the four assaults alleged in his complaint, as well as to other matters, and requests "protection." J.A. 36-39 (grievances). Nothing in the record suggests that, in any of these grievances, petitioner requested monetary compensation.

attachment to the complaint form, he referred to "[n]o physical brutality by prison staff"; "[d]ecent [c]onditions in [p]rison"; [t]he [r]ight to decent medical care"; "[i]njunction"; "[a]ffirmative [o]rders ... [d]amages money"; "[c]ompensatory damages (pain and suffering) [n]ominal damages (mental anguish)"; and "[d]amages from the government." J.A. 11. Later in the handwritten attachment, he asked for "each and every officer to be punished for assaulting me." J.A. 16.

Petitioner followed up his complaint with several other filings, variously styled,[7] which repeated and expanded upon his allegations and requests for relief. *E.g.*, J.A. 26 (requesting appointment of counsel, a transfer out of SCI-Smithfield, an injunction "so that the prisoner will not be beaten again," and $400,000 in damages). Many of these filings likewise summarize the relief petitioner was seeking in other lawsuits,[8] including an

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[7]*See* J.A. 17 (affidavit for show of cause for emergency preliminary injunction and protective order); 21 (affidavit in support of motion to proceed in forma pauperis and for appointment of counsel and preliminary injunction for protection); 24 (petition for affirmative order "records" also relief plaintiff seeks); 26 (petition to show cause for appointment of counsel, to keep top officials as defendants; amending relief plaintiff seeks); 28 (amendment to specific relief). The Court of Appeals construed at least some of these later filings as amendments to petitioner's complaint. Pet. App. 21a-22a n.10.

[8]According to the District Court's docket, petitioner has filed thirteen lawsuits in the Middle District of Pennsylvania. (continued...)

operation on his shoulder, orders regarding the prison law library, and various amounts in damages. *E.g.*, J.A. 21, 24-25, 26-27. It is not clear whether petitioner intended to incorporate these requests for relief into this lawsuit.[9]

The District Court, citing 42 U.S.C. § 1997e(a), dismissed petitioner's complaint without prejudice for failing to exhaust the administrative remedy made available by the Inmate Grievance System. Pet. App. 36a-39a.

3. Petitioner, electing to stand on his complaint without amendment, Pet. App. 7a-8a n.3, appealed. He conceded that he had not exhausted the remedies of the Inmate Grievance System, Pet. App. 20a; but argued that, because the Inmate Grievance System could not provide

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[8](...continued)
See U.S. District Court PACER, http://pacer.pamd.uscourts.gov. Petitioner's filings in this case refer, by docket number, to the following cases: *Booth v. Smithfield Department of Correction*, No. 97-cv-00629 (filed April 22, 1997); *Booth v. Rikus*, No. 97-cv-00630 (filed April 22, 1997); and *Booth v. Smithfield State Prison*, No. 97-cv-00710 (filed May 2, 1997). *See, e.g.*, J.A. 24-25. In addition, petitioner refers to an action pending in the Court of Common Pleas of Huntingdon County, Pennsylvania at No. 97-499. *See* J.A. 21.

[9]In this Court, petitioner takes the position that "none of these [requests] were actually part of his complaint or claims for relief." Reply in Support of Pet. at 3. The Court of Appeals, however, perhaps misled by the difficulty of deciphering petitioner's lengthy handwritten filings, believed that they were. *See* Pet. App. 5a, *quoting* J.A. 26-27.

him with the money damages he sought, no administrative remedy was "available" within the meaning of Section 1997e(a).[10] Pet. App. 21a. The Court of Appeals, relying on its recent decision in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), rejected this argument. Pet. App. 22a-23a.

In *Nyhuis*, the Court of Appeals had held that Section 1997e(a), as amended by the Prison Litigation Reform Act (PLRA),[11] "make[s] exhaustion of all administrative remedies necessary — whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." 204 F.3d at 67, *quoted at* Pet. App. 22a. The Court of Appeals had looked in *Nyhuis* to the plain meaning of the statutory language, particularly in light of the changes wrought by the PLRA; to Congress' intent in the PLRA to reduce both the burden of prisoner lawsuits and judicial oversight of the management of prisons; and to the purposes of exhaustion generally. In light of these, the Court of Appeals had concluded in *Nyhuis* that Congress

> "intended to require prisoners to utilize the existing administrative remedies, whether

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[10]Petitioner also argued that his action was not one "with respect to prison conditions" within the meaning of Section 1997e(a). The majority of the Court of Appeals panel rejected this argument, Pet. App. 8a-19a, *cf.* Pet. App. 24a-28a (Noonan, J., concurring and dissenting), and petitioner did not pursue it in this Court. Pet. 6 n.3.

[11]Pub.L. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 to 1321-77 (1996).

> the grievance procedure will produce the precise remedy that the prisoner seeks or some other remedy."

204 F.3d at 73, *quoting Moore v. Smith*, 18 F.Supp.2d 1360, 1364 (N.D.Ga. 1998). *Nyhuis* was a *Bivens* action against federal officials, but the Court of Appeals held that its rationale applied equally — indeed, with even greater force — to Section 1983 actions against state officials. Pet. App. 22a-23a. Accordingly, the Court of Appeals affirmed the order of the District Court.

On February 4, 1998, while petitioner's appeal was pending in the Court of Appeals, petitioner was transferred from SCI-Smithfield to the State Correctional Institution at Pittsburgh, Pennsylvania. *See* Br. for Petitioner at 4 n.3.

SUMMARY OF ARGUMENT

1. Section 1997e(a) of Title 42 provides that "[n]o action shall be brought by a prisoner ... until such administrative remedies as are available are exhausted." On its face, this provision requires that a prisoner exhaust any administrative remedy which can address his or her complaint, whether or not that remedy offers the precise relief the prisoner seeks in a lawsuit. Petitioner was thus required to exhaust the administrative remedies available at his prison, even though those remedies would not award him the monetary damages he sought in his lawsuit.

Congress enacted Section 1997e(a) in 1980, in an attempt to deal with the burdens placed on the federal

court system by prisoner civil rights suits, which even then had reached explosive proportions. In its original form, it provided only that courts could stay prisoner suits to allow the exhaustion of administrative remedies, but only if the court determined, or the Attorney General certified, that those remedies, among other things, were "effective"; even then, the stay was discretionary with the court. Comments of the Court and the Attorney General strongly suggested that, where a prisoner sought only money damages, an administrative remedy would be "effective" under Section 1997e(a) only if it provided them.

Section 1997e(a), however, itself proved ineffective in dealing with prisoner lawsuits, whose numbers continued to rise dramatically. Congress responded in 1996 with the Prison Litigation Reform Act (PLRA), which was designed both to reduce the burden of prisoner lawsuits, and to reduce judicial oversight of the management of prisons. Among other things, the PLRA rewrote Section 1997e(a), eliminating the requirement that administrative remedies be "effective," eliminating judicial oversight of the sufficiency of prison remedies, and eliminating judicial discretion in whether to require exhaustion. A prisoner must now exhaust all "available" remedies before bringing an action, whether or not those remedies would have been considered "effective" under the previous version of the statute.

Petitioner's reading of the statute relies on words and phrases taken out of context, and taken particularly out of their historical context in light of the PLRA amendments. His reading would resurrect the idea that courts should evaluate prison administrative remedies for

"effectiveness," thus depriving the PLRA amendments of any real effect.

2. The broad exhaustion rule adopted by Congress best comports with the purposes of the PLRA. It promotes the resolution of disputes outside of litigation. It helps narrow, clarify and focus those issues that do go to litigation, thus lessening the burden on courts of sifting through prisoners' pro se complaints. It provides notice to prisons of problems and complaints; and provides a bright-line rule, easily understood by prisoners, prisons and courts alike. In all these ways, it reduces the burden of prisoner litigation on courts and other participants in the judicial system; and this is so even where the administrative remedy cannot provide a prisoner with monetary relief. Exhaustion is thus not a "futile" exercise merely because it cannot produce the relief which a prisoner might seek in a lawsuit.

In addition, the broad rule of requiring exhaustion in all cases eliminates any need for courts to evaluate the sufficiency of prison remedies on a case-by-case basis. This again reduces the burden of prisoner suits on the courts, while simultaneously reducing intrusive judicial oversight of prisons.

Petitioner's reading, on the other hand, would thwart these goals. It would allow prisoners to evade the exhaustion requirement at will, simply by tailoring the relief they sought; and it would bog down the courts — and the prisons — in satellite litigation over the sufficiency of prison administrative processes.

3. There is no general "futility" principle, under which the failure to exhaust is excused whenever the prescribed administrative remedy cannot provide the relief sought. The authority to prescribe the procedures under which claims may be heard in the federal courts belongs to Congress; and where Congress explicitly requires that administrative remedies be exhausted, exhaustion may not be dispensed with even where a court might conclude that the administrative process is "futile." In this case, the language, history, structure and purposes of Section 1997e(a) all show that Congress intended to impose a broad exhaustion requirement on prisoners before they were permitted to file federal lawsuits. The courts are not free to rewrite the statutory text to create an exception which Congress did not.

ARGUMENT

The issue in this case is whether, under 42 U.S.C. § 1997e(a), a prisoner who seeks monetary damages in a civil rights suit must first exhaust the administrative remedies at his prison, even where those remedies do not make provision for monetary payments. We submit that Section 1997e(a) embodies a broad rule which does require exhaustion in these circumstances. We address this issue first in light of the language of Section 1997e(a), particularly in the context of its amendment by the PLRA; then in light of the purposes Congress sought to advance by this statute; and finally in light of the "general principles of administrative law" which petitioner invokes.

I. The Language of Section 1997e(a) Requires A Prisoner to Exhaust Any Administrative Procedure Capable of Addressing the Subject of the Prisoner's Complaint, Whether or Not That Procedure Can Provide the Precise Relief the Prisoner Wants.

A. Before its amendment by the PLRA, Section 1997e required exhaustion only of those administrative remedies determined to be "effective," and even then only in the discretion of a court.

Section 1997e was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act, Pub.L. 96-247, 94 Stat. 352 (1980), and imposed a limited exhaustion requirement on actions brought by state or local prisoners under Section 1983. *See* 42 U.S.C. § 1997e (1994 ed.).[12] Section 1997e(a) allowed a court to continue such an action for 90 days[13] "to require exhaustion of such plain, speedy and effective administrative remedies as are available," *id.*, § 1997e(a)(1), if either the Attorney General or the court determined that the administrative remedies complied with "minimum acceptable standards" promulgated by the Attorney General, or were otherwise "fair and effective." *Id.*, § 1997e(a)(2); *see id.*, § 1997e(b) (minimum standards for systems for grievance

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[12]The full text of Section 1997e, as it read before it was amended by the PLRA, is reprinted in the appendix to this brief at 5a.

[13]Later enlarged to 180 days. *See* Pub.L. 103-322, tit. II, § 20416(a)(2), 108 Stat. 1833 (1994).

resolution); § 1997e(c) (procedure for review and certification of systems for grievance resolution). Even if a prison's administrative procedures complied with these "minimum acceptable standards," exhaustion was required only if the court "believe[d]" that [it] would be appropriate and in the interests of justice." *Id.*, § 1997e(a)(1). Thus, a court retained "ample discretion to determine that exhaustion nonetheless should be foregone." *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992).

The Department of Justice, charged with certifying the adequacy of administrative procedures, strongly encouraged state and local authorities to make provision for money damages. The Department's regulations provided that "[t]he grievance procedure shall afford a successful grievant a meaningful remedy. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary." 28 C.F.R. § 40.6 (2000). While the Department stopped short of an outright requirement that grievance procedures make available monetary relief,[14] it did observe that "the relief available under the procedure must approximate the remedies available under [section 1983],"[15] — which of course include money damages —

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[14]"[A]lthough monetary relief is desirable, it is not an essential component of a fair and effective grievance procedure." 46 Fed. Reg. 3845 (1981).

[15]"If exhaustion is to be a realistic alternative ..., the relief available under the procedure must approximate the remedies available under [section 1983]. ... [G]rievance procedures must be empowered to award a broad range of

(continued...)

and stated its view that exhaustion often would not be "appropriate" within the meaning of Section 1997e if monetary relief were not available.[16]

The Court too commented on Section 1997e's requirement of "effective administrative remedies." *McCarthy v. Madigan, supra*, was an action, for money damages only, brought by a federal prisoner under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); and the Court held that, since the Bureau of Prisons grievance procedure did not provide for awards of money damages, the prisoner was not required to exhaust his administrative remedies. In reaching this conclusion, the Court first observed that "Congress has not meaningfully addressed the appropriateness of requiring exhaustion in this context," since Section 1997e (at that time) applied only to actions brought by state prisoners under Section 1983. 503 U.S. at 149. Nevertheless, the Court looked to Section 1997e for guidance, 503 U.S. at 149-51, and observed:

> [I]n contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, [Section 1997e] conditions exhaustion on the existence of "effective administrative

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[15](...continued)
remedies." 45 Fed. Reg. 79099 (1980).

[16]"Presumably, where monetary relief was the sole adequate remedy and could not be obtained through a grievance procedure, exhaustion would not be appropriate." 46 Fed. Reg. 3845 (1981).

> remedies." It is difficult to see why a stricter rule of exhaustion than Congress itself has required in the state prison context should apply in the federal prison context.

503 U.S. at 150-51, *quoting* 42 U.S.C. § 1997e(a)(1) (1994 ed.). The Court thus strongly suggested, albeit in dicta, that Section 1997e's requirement of "effective administrative remedies" implied provision for money damages, at least where money damages was the only relief a prisoner sought.

Congress enacted Section 1997e in an effort to deal with the burdens imposed by the explosive growth in prisoner civil rights actions, which increased from 2,030 in 1978, to 11,195 in 1979. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1985 Report of the Director, A-7 (Table C2). Congress anticipated that Section 1997e "will make an important contribution toward reducing court backlog in many districts. ... Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration." S. Rep. No. 415, 96th Cong., 2d Sess. 34 (1980). *See Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 509 (1982) ("Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions," collecting legislative history)

Section 1997e's "extraordinarily detailed exhaustion scheme," *Patsy*, 457 U.S. at 509-10, however,

had little effect. State and local governments viewed its certification requirement as too burdensome and intrusive, and its limited exhaustion provision as too insubstantial, to make their participation worthwhile. *See* Lay, *Exhaustion of Grievance Procedures for State Prisoners under Section 1983 of the Civil Rights Act*, 71 Iowa L. Rev. 935, 937, 949-50 (1986); 46 Fed. Reg. 48186 (1981) (summarizing comments on Department of Justice's proposed rules). As a result, only a handful of prison authorities sought and obtained certification of their grievance systems from the Department of Justice. Lay, *supra*, 71 Iowa L. Rev. at 941-42. In the meantime, prisoner lawsuits continued to rise, from 19,448 in 1985 to 41,679 in 1995. Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1985 Report of the Director A-7 (Table C2); Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1999 Report of the Director 140 (Table C2A).

B. In the PLRA, Congress amended Section 1997e to remove the requirement that administrative remedies be "effective," to remove judicial oversight of the adequacy of administrative remedies, and to eliminate judicial discretion in requiring exhaustion.

Congress responded to this situation in 1996 with the Prison Litigation Reform Act (PLRA), Pub.L. 104-134, 110 Stat. 1321, which among other things substantially amended Section 1997e. The PLRA added to Section 1997e provisions allowing courts to screen prisoner complaints for frivolous or meritless actions, § 1997e(c);

limiting attorneys fees to successful prisoner litigants, § 1997e(d); barring suits by prisoners for emotional or mental injury without a prior showing of physical injury, § 1997e(e); encouraging hearings to be held in prisons or by telecommunication, § 1997e(f); and permitting defendants to waive replying to actions by prisoners, § 1997e(g).[17]

Most relevant to this case, the PLRA substantially rewrote Section 1997e's provisions on the exhaustion of administrative remedies. It deleted the requirement that administrative remedies be "plain, speedy and effective"; deleted the requirement for a determination by the Attorney General or a court that the administrative remedies complied with "minimum acceptable standards" or were otherwise "fair and effective";

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[17]Elsewhere, the PLRA also added provisions limiting the power of federal courts to issue injunctions regarding prison conditions; requiring all prisoners to pay filing fees; denying in forma pauperis status to prisoners who have had three or more dismissals of frivolous or meritless filings; providing for the collection of costs from prisoners; allowing district courts to screen prisoner complaints before docketing; and permitting the revocation of earned good time credits for federal prisoners who file malicious or knowingly false claims. *See* 18 U.S.C. § 3626 (1994 ed., Supp. IV); 28 U.S.C. §§ 1915, 1915A, 1932 (1994 ed., Supp. IV). The PLRA also provides that any damages awarded to a prisoner be paid directly to satisfy any outstanding restitution orders, and that the prisoner's crime victims be notified of any such award before it is paid to the prisoner. Pub.L. 104-134, §§ 807, 808, 110 Stat. 1321, 1321-75 and 1321-76, *reprinted at* 18 U.S.C. § 3626 note (1994 ed., Supp. IV).

eliminated the courts' discretion to require exhaustion only where a court believed it to be "appropriate and in the interests of justice"; changed the former 180-day continuance to a flat prohibition on bringing an action; and expanded the exhaustion requirement to apply to federal as well as state prisoners. As thus re-written, the exhaustion requirement now provides simply that "[n]o action shall be brought ... by a prisoner ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (1994 ed. Supp. IV).

We submit that, considered in its historical context, the meaning of this language is clear. Under the pre-PLRA statute, an "effective" remedy, at least in the context of a claim such as petitioner's, was one that provided for money damages. But by eliminating any requirement that a prison administrative remedy be "effective," Congress plainly meant to require prisoners to exhaust "such administrative remedies as are available," whether or not those remedies would have been considered "effective" under the pre-PLRA statute. Congress' further action in eliminating judicial oversight of the sufficiency of administrative remedies, and in making exhaustion mandatory rather than discretionary, only strengthens the conclusion that "Congress no longer wanted the courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is 'available' in the prison involved." *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998). Thus, in our view, a prisoner has an "administrative remed[y] ,,, available" if there exists an administrative procedure which can address the subject matter of his complaint, "'whether [it] will produce the precise remedy that the prisoner seeks or some other remedy.'" *Nyhuis v.*

Reno, 204 F.3d at 73, *quoting Moore v. Smith*, 18 F.Supp.2d 1360, 1364 (N.D.Ga. 1998).

C. Petitioner's narrow reading of Section 1997e's exhaustion requirement would deprive the PLRA amendments of "real and substantial effect."

Petitioner, however, argues that the "plain language" of Section 1997e(a) requires prisoners to pursue "only those administrative remedies that are capable of providing them the relief they seek." Br. for Petitioner at 15. Petitioner's argument relies heavily on dictionary definitions of isolated words, *see* Br. for Petitioner at 16, but even on its own terms, this argument is unconvincing. A remedy does not cease to be "capable of use," "accessible," "obtainable," or "ready for immediate use," just because it is not the remedy a prisoner desires.[18] In our view, the most natural reading of the phrase "such administrative remedies as are available" is that prisoners must exhaust whatever remedies their prison offers, whether or not this produces the relief they prefer.

Petitioner likewise focuses on the phrase "administrative ... procedure," which appears in subsection (b) of Section 1997e. This provides that "[t]he failure of a State to adopt or adhere to an *administrative grievance procedure* shall not constitute the basis for an

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[18]*See* Br. for Petitioner at 16, *quoting Webster's Third New International Dictionary* 150 (1993) and *Black's Law Dictionary* 135 (6th ed. 1990).

action" by the Attorney General under the Civil Rights of Institutionalized Persons Act. 42 U.S.C. § 1997e(b) (emphasis added); *see* 42 U.S.C. §§ 1997a, 1997c (1994 ed., Supp. IV). As petitioner sees it, the term "administrative procedure" stands in contrast to the term "administrative remedies" used in subsection (a), and illustrates that Congress intended to require exhaustion only of the prisoner's desired "remedy," and not merely of whatever "procedure" is available. *See* Br. for Petitioner at 21-22. In fact, however, it illustrates just the opposite.

Before the amendments enacted by the PLRA, the provision which now appears at Section 1997e(b) was codified as subsection (d) of the same section. As we discussed above, at that time subsection (a) provided for a limited exhaustion of "administrative remedies" that complied with the Attorney General's minimum standards. Subsection (b) directed the Attorney General to promulgate minimum standards for "system[s] for the resolution of grievances." Subsection (c) directed the Attorney General to develop a procedure for reviewing and certifying "systems for the resolution of grievances," and for withdrawing the certification of any "grievance procedure" which no longer complied with the minimum standards. Finally, subsection (d) — now recodified, with slight changes, to subsection (b) — provided that the failure of a State to adopt or adhere to an "administrative grievance procedure consistent with this section" could not be the basis for an action by the Attorney General. *See* 42 U.S.C. § 1997e(a)-(d) (1994 ed.). It is thus apparent that, as used in Section 1997e, the phrases "administrative remedies," "systems for the resolution of grievances," "grievance procedure," and "administrative grievance procedure" are synonymous with each other: an

"administrative grievance procedure" *is* an "administrative remedy."

More important than these specific shortcomings, however, is that petitioner's entire approach, with its emphasis on words and phrases taken in isolation, is unsound. The Court has recognized that even "the most natural reading of [a] phrase ... when viewed in isolation" may not accurately reflect the meaning of a statute. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). Rather, "statutory language must always be read in its proper context. ... 'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *Ibid, quoting Crandon v. United States*, 494 U.S. 152, 158 (1990).

Here, the central flaw in petitioner's approach is its failure to consider the meaning of Section 1997e *in the context of its amendment by the PLRA.* Those amendments, on their face, stiffened the statute's exhaustion requirement, eliminated judicial discretion on whether exhaustion should be required, and eliminated judicial inquiry into whether administrative remedies are "plain, speedy and effective" or "fair and effective." "When Congress amends a statute, we presume it intends its amendment to have real and substantial effect," *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 397 (1995), yet petitioner's reading does just the opposite.

Petitioner attempts to avoid this difficulty by positing that the pre-PLRA statute's requirements that remedies be "plain, speedy and effective" or "fair and effective" encompassed "solely procedural requirements"

and not "substantive remed[ies]." Br. for Petitioner at 36-39. There are two problems with this. First, it is at odds with the ordinary meaning of the phrases; with the understanding the Court expressed in *McCarthy v. Madigan*, 503 U.S. at 150-51, *see supra* at 16-17; and with the understanding of the Attorney General, whose minimum standards for a "plain, speedy and effective system" explicitly addressed substantive remedies. *See supra* at 15-16. Second, if indeed Section 1997e did not address the provision of "substantive remedies" before its amendment by the PLRA, then it surely does not do so now: the point of the PLRA amendments was to broaden the circumstances under which exhaustion would be required, not to narrow them.

Finally, petitioner points to proposed legislation introduced by Representative LoBiondo before the PLRA's enactment, which would have amended Title 18 of the United States Code by adding the following provision:

> No action shall be brought in any court, by a prisoner in the custody of the Federal Bureau of Prisons, concerning any aspect of such prisoner's incarceration until any administrative remedy procedures available are exhausted. ... *The fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them.*

H.R. 2468, 104th Cong. § 4048 (emphasis added). Congress did not enact H.R. 2468, and from this petitioner argues that "'[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.'" Br. for Petitioner at 40, *quoting Russello v. United States*, 464 U.S. 16, 23-24 (1983). However, as the Court remarked in an earlier case involving the PLRA, petitioner "overstates the inferences that can be drawn from an ambiguous act of legislative drafting." *Martin v. Hadix*, 527 U.S. 343, 357 (1999).

First, the italicized provision from H.R. 2468 comprises not words of "limitation" but of explanation, which might well have been regarded as superfluous. Second, this provision was not "deleted" from an "earlier version" of the PLRA; it was never *in* the PLRA, but in a separate legislative proposal which took a different tack to the same problem. The PLRA attacked the problem of exhaustion not through a separate provision for federal prisoners, as H.R. 2468 did, but by strengthening the exhaustion requirement of Section 1997e — which originally applied only to state prisoners who filed Section 1983 actions — and extending that strengthened provision to federal prisoners as well.[19] Third, as petitioner recognizes, Representative LoBiondo expressed himself

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[19]Every appellate court to have considered the issue agrees that the PLRA extended Section 1997e's exhaustion requirement to *Bivens* and other actions brought by federal prisoners. *See Nyhuis v. Reno*, 204 F.3d at 68-69; *Alexander v. Hawk*, 159 F.3d at 1324; *Whitley v. Hunt*, 158 F.3d 882, 885 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997).

satisfied that the PLRA would accomplish the objectives of his own proposal. Br. for Petitioner at 40-41, *quoting* 141 Cong. Rec. H14105 (daily ed., Dec. 6, 1995). Fourth, petitioner again takes this "deleted" language in isolation, out of its proper context. It is simply untenable to suppose that Congress, having eliminated all provisions authorizing judicial inquiries into the "effectiveness" of administrative remedies, simultaneously meant to authorize courts to reject exhaustion whenever "administrative remedies do not include all the possible procedures and forms of recovery that are available in [a] civil action."

In the final analysis, then, petitioner's reading of Section 1997e)(a) cannot be squared with either its language or its history. As several courts have pointed out, petitioner's reading would require courts to conduct individualized evaluations of "each cause of action and each type of relief sought in each prisoner's complaint and determine whether the [prison] can grant any adequate relief," thus reintroducing the very inquiry into "effectiveness," and the element of judicial discretion, which the PLRA deleted. *Alexander v. Hawk*, 159 F.3d at 1326; *accord Nyhuis v. Reno*, 204 F.3d at 72-73; *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 893 (S.D.N.Y. 1998).

Thus, even if petitioner's reading of the phrase "such administrative remedies as are available" were "the most natural reading of [the] phrase ... when viewed in isolation," *McCarthy v. Bronson*, 500 U.S. at 139 — which it is not — it should be rejected because it deprives the PLRA amendments of any "real and substantial effect." Moreover, petitioner's reading is at odds with "the design

of the [PLRA] as a whole and ... its object and policy," *ibid*, and to that subject we now turn.

II. The Broad Exhaustion Rule Mandated by Congress Best Serves the Purposes of the PLRA.

Congress enacted the PLRA, in part, to deal with the problem posed by frivolous, meritless and abusive prisoner lawsuits. Lawsuits of this kind accounted for the overwhelming majority of the over 41,000 prisoner civil rights actions filed in 1995, when the PLRA was enacted, and Congress naturally devoted much attention to them. *See, e.g.*, 141 Cong. Rec. S14418 (daily ed., Sept. 27, 1995) (remarks of Sen. Hatch) ("The vast majority of these suits are completely without merit. Indeed, roughly 94.7 percent are dismissed before the pretrial phase, and only a scant 3.1 percent have enough validity to even reach trial");141 Cong. Rec. S7524-25 (May 25, 1995) (remarks of Sen. Dole); *Alexander v. Hawk*, 159 F.3d at 1324 (collecting legislative history). Such lawsuits, however, were not Congress' only concern.

Rather, Congress focused more broadly, as petitioner recognizes, *see* Br. for Petitioner at 42, on the problems presented by prisoner litigation in general.[20] In

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[20]Several provisions demonstrate this. Some, indeed, apply only to successful prisoner litigants, whose claims by definition cannot have been meritless. *See* 42 U.S.C. § 1997e(d) (1994 ed., Supp. IV) (limiting attorneys fees); *id.*, § 1997e(e) (barring some actions for mental or emotional injury); Pub.L. 104-134, §§ 807, 808, 110 Stat. 1321, 1321-75 and 1321-76, *reprinted at* 18 U.S.C. § 3526 note (1994 ed., Supp. IV) (continued...)

addition, Congress wanted to "curtail interference by the Federal courts ... in the orderly administration of our prisons." 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (remarks of Sen. Abraham); 141 Cong. Rec. S14627 (daily ed., Sept. 29, 1995) (remarks of Sen. Hatch) ("time to wrest control of our prisons from the lawyers and the inmates and return [it] to competent administrators").[21] Both of these purposes — reducing the burden of prisoner lawsuits, and reducing judicial oversight of the nation's prisons — are furthered by the broad exhaustion rule which Congress mandated in Section 1997e(a).

Exhaustion, of course, conserves judicial resources by channeling claims to an administrative forum for possible resolution, and this is particularly true for prisoner claims. Many complaints which are utterly without merit as a constitutional matter — for example, that a prison canteen is not accurately filling the orders of its "customers"[22] — might be quite legitimate as an administrative matter, and can be settled at that level. Exhaustion likewise allows an administrative agency to

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[20](...continued)
(damages awarded to prisoner to be used to satisfy restitution orders, crime victims to be notified of award).

[21]*See* 18 U.S.C. § 3626 (1994 ed., Supp. IV) (limiting power of federal courts to issue prospective relief regarding prison conditions).

[22]*See* 141 Cong. Rec. 14627 (daily ed., Sept. 29, 1995) (remarks of Sen. Hatch) ("Inmate's claim: he ordered two jars of chunky peanut butter from the prison canteen and was sent one jar of chunky and one jar of creamy.")

develop the factual background of a claim, to discover and correct its own errors, to apply its discretion and expertise, and to improve the efficiency of its own processes. *See, e.g., McKart v. United States*, 395 U.S. 185, 193-95 (1969); *Alexander v. Hawk*, 159 F.3d at 1327.

Exhaustion serves important purposes even where, as here, a prisoner's lawsuit seeks money damages which are not obtainable from the administrative process. First, it promotes the resolution of prison disputes outside of litigation. As then-Justice Rehnquist remarked in the context of appeals from labor union decisions, "[r]esort to the union appeals procedure provides the union with its first opportunity to focus on the issue.... [It] gives the union an opportunity to satisfy the employee that its decision ... was correct." *Clayton v. Int. Union, United Auto., Aerospace and Agricultural Implement Workers of America*, 451 U.S. 679, 700 (1981) (Rehnquist, J., dissenting). The same is true of prisons and prisoners. In addition, the relief requested in a lawsuit is not always a reliable guide to the relief a prisoner might find acceptable, if only because prison administrators can grant a variety of "in-kind" relief which a court ordinarily cannot. *See, e.g., Rumbles v. Hill*, 182 F.3d 1064, 1066-67 (9th Cir. 1999) (district court held that it was without power to conduct its own investigation or to compel an apology); *Perez v. Wisc. Dept. of Corrections*, 182 F.3d 532, 538 (7th Cir. 1999) (ability to afford in-kind relief makes it impossible to draw bright line between damages and other relief).

Second, even if no settlement is reached, administrative proceedings can help to clarify, narrow and focus issues for a court, "a function that is especially

beneficial in a field dominated by pro se litigation." *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d at 895. As one court puts it,

> Prisoners' complaints about prison conditions are often filed pro se and generally contain a layman's recitation of complaints about the prison without articulating clearly the legal causes of action in issue and necessitating significant expenditure of judicial resources to review and refine the nature of the legal claims in a prisoner's complaint. ... [An] administrative remedy program ... often helps to focus and clarify the issues for the court.

Alexander v. Hawk, 159 F.3d at 1326 n.11. Petitioner's lengthy, handwritten filings in this case illustrate the difficulties which face courts in dealing with prisoner complaints, and the potential benefits of the administrative process. *See supra* at 7-8 & n.9. Even where a prison grievance procedure is relatively informal and creates no elaborate "record," as will often be the case, it can facilitate the gathering of evidence and the development of a factual background that improves the efficiency of subsequent litigation.

Third, invoking administrative remedies puts prison officials on notice of problems and complaints. Offending practices can be halted, thus freezing the time frame for damages, and obviating future lawsuits on the same issue.

Finally, the across-the-board exhaustion mandated by Congress provides a bright-line rule that benefits courts, prisoners and prisons alike, while at the same time avoiding judicial oversight of prison administrative processes. As the Court said in considering another statute designed to lessen the burden of prisoner litigation, "[this] reading furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of petitioner's suggested exception...." *McCarthy v. Bronson*, 500 U.S. at 143. As the Third Circuit said,

> Congress intended to save courts countless hours, educating themselves in every case, as to the vagaries of prison administrative processes, state or federal. ... [The alternative] would involve federal courts in the tedious and intrusive process of evaluating each prisoner's cause of action and the underlying administrative scheme in each prison — something Congress was plainly guarding against when it enacted the PLRA.

Nyhuis v. Reno, 204 F.3d at 74. And as this case illustrates, these inquiries might have to be undertaken not once but several times, as new requests for relief are introduced and existing ones are withdrawn or mooted. *See supra* at 6-8, 10.

Exhaustion of administrative remedies is thus by no means "futile" just because a prisoner does not get, or even cannot get, what he says he wants in his lawsuit; and it was neither "illogical," Br. for Petitioner at 39, nor

against "common sense" *id.* at 12, for Congress to require exhaustion in all cases.

Petitioner's approach, in contrast, would neither lessen the burden of prisoner litigation on the justice system, nor reduce judicial oversight of prison systems, and in fact would frustrate both goals. For one thing, It would enable prisoners to bypass administrative processes at will; as the Seventh Circuit said, "Section 1997e would not be worth much if prisoners could evade it simply by asking for relief that the administrative process is unable to provide." *Perez v. Wisc. Dept. of Corrections*, 182 F.3d at 537. This Court, too, has recognized the dangers in allowing litigants to bypass exhaustion requirements by artfully tailoring the relief they request. *See Heckler v. Ringer*, 466 U.S. 602, 621 (1984) (Medicare claimant cannot bypass administrative remedies by simply bringing declaratory judgment action). And, of course, "every premature filing of an action ... imposes some burden on the judicial system and on [those who] must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast number of claims." *McNeil v. United States*, 508 U.S. 106, 112 (1993) (prisoner must exhaust administrative remedies before filing Federal Tort Claims Act action).

Moreover, petitioner's approach would re-involve the courts in case-by-case evaluations — time-consuming for courts and intrusive for prisons — of the sufficiency of prisons' administrative processes "as they attempted to discover whether the local administrative process could have, would have, or might have afforded the inmate relief." *Nyhuis v. Reno*, 204 F.3d at 75. The satellite

litigation that "would inevitably arise," *McCarthy v. Bronson*, 500 U.S. at 143, over this issue would increase, not lessen, the burden of prisoner litigation. It was to avoid precisely this result that Congress, even in the pre-PLRA statute, rejected petitioner's approach of open-ended judicial oversight of the sufficiency of prison administrative remedies. Congress feared that, under this approach, courts "would have to judge a myriad of state procedures without much guidance," and that "this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. at 514 n.18.[23] Petitioner's reading of the exhaustion requirement would thus thwart, rather than further, Congress' purposes.

III. Where Congress Has Specifically Required Exhaustion, the Courts May Not Interpose a "Futility" Exception.

Finally, petitioner argues that "well-established principles of administrative law" establish that administrative remedies need not be exhausted "when the agency to which the litigant must apply for relief 'has no power to decree [the] relief.'" Br. for Petitioner at 24-25, *quoting Reiter v. Cooper*, 507 U.S. 258, 269 (1993). The

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[23]Congress therefore directed the Attorney General to develop minimum standards against which to measure the existence of "effective administrative remedies." *Id.*, at 514 n.16. Of course, the PLRA obviates this problem, since courts are no longer to evaluate whether administrative remedies are "effective" at all.

Court's decisions, however, do not support this broad proposition. Rather, the Court has consistently recognized the primacy of Congress in this area, and has consistently respected the balance struck by Congress as to whether and when exhaustion will be required.

The touchstone of the law of exhaustion is not general "principles of administrative law" but congressional intent. Simply put, "exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute." *Coit v. FSLIC*, 489 U.S. 561, 579 (1989).

> Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. ...[C]ourts may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent.

Patsy v. Bd. of Regents of Fla., 457 U.S. at 501. Exhaustion must thus be applied "with an understanding ... of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. at 193.

Bethesda Hosp. Assn. v. Bowen, 485 U.S. 399 (1988), one of the cases petitioner cites, demonstrates how legislative intent, and not some general "futility" exception, governs the application of exhaustion requirements. In *Bowen*, Medicare providers challenged the validity of regulations governing their reimbursement.

The reimbursement scheme required providers to submit their reimbursement requests first to a fiscal intermediary; the provider could then appeal to the Provider Reimbursement Review Board, with subsequent review in a district court. *Id.*, at 400-01. The Court held that the providers' challenge to the regulations need not be submitted to the fiscal intermediary, not merely because this would be "futile," but because "no statute or regulation expressly mandate[d] it." *Id.*, at 404. The Court noted, however, that such challenges did have to be submitted to the Board, even though "*neither* the fiscal intermediary nor the Board has the authority to declare regulations invalid," because the statute did not treat the two entities alike. *Id.*, at 406-07 (emphasis added).

The other cases cited by petitioner follow the same pattern. *See* Br. for Petitioner at 24-26. In *Reiter v. Cooper, supra* and *Clayton v. Int. Union, supra*, the Court did look to principles of "federal common law," *id.* at 687, crafted by the judiciary, to excuse a litigant from exhaustion on the ground that the administrative agency could not provide relief,[24] but in both of those cases the governing statutes were silent on the issue of exhaustion. *Reiter*, 507 U.S. at 270; *Clayton*, 451 U.S. at 686 n.9. *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984), relied on a statutory grant of authority to district courts to grant "appropriate relief," to reach the same result; *accord Honig v. Doe*, 484 U.S.

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[24]*See Patsy v. Bd. of Regents of Fla.*, 457 U.S. at 518 (White, J., concurring in part) ("exhaustion is a rule of judicial administration ... and unless Congress directs otherwise, rightfully subject to crafting by judges")(internal quotation marks and citation omitted).

305, 327 (1988) (citing legislative history). And *McNeese v. Board of Education*, 373 U.S. 668 (1963), held that requiring exhaustion would be contrary to the statutory scheme — in that case, Section 1983 — under any circumstances. *Accord Patsy v. Bd. of Regents of Fla., supra.* Exhaustion in these cases was thus excused, not under some overarching "principle of administrative law," but by reference to the terms of the particular statutes in question.

By the same token, where a statute does require that administrative remedies be exhausted, the courts "are not free to rewrite the statutory text" to excuse exhaustion, *McNeil v. United States*, 508 U.S. at 11; and exhaustion "may not be dispensed with merely by a judicial conclusion of futility." *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975).[25] In such cases, remedies must be exhausted even where the administrative agency cannot

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[25]In rare cases with exceptional circumstances, the Court has excused the failure to exhaust even in the face of a clear statutory requirement. *Mathews v. Eldridge*, 424 U.S. 319 (1975), involved a challenge to agency procedures that was collateral to the applicant's claim for benefits, and a claim of irreparable injury from a wrongful denial. *Id.*, at 331-32. In *Bowen v. City of New York*, 476 U.S. 467 (1986), the government denied benefits on the basis of a secret, illegal policy which claimants could not challenge since they were not aware it existed, and again, the case involved a claim of irreparable injury. *Id.*, at 480-84. The Court has emphasized the narrowness of these holdings, *id.*, at 485 ("unique circumstances"); *Heckler v. Ringer*, 466 U.S. at 618 ("special cases"), and of course they have nothing in common with the case before the Court.

grant relief. Thus, in *Salfi*, the Court held that the Social Security Act required claimants to present their claims first to the Secretary of Health, Education and Welfare, even though they were challenging the constitutionality of statutory provisions which the Secretary had no power to alter; claimants who had not done so were precluded from seeking judicial relief.[26] 422 U.S. at 762-64. In *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 120 S.Ct. 1084 (2000), the Court reached the same result in a case involving the Medicare statutes:

> The Council's members remain free, however, *after following the special review route that the statutes prescribe*, to contest in court the lawfulness of any regulation or statute upon which the agency determination depends. The fact *that the agency might not provide a hearing for that particular contention, or may lack the power to provide one ... is beside the point....*

529 U.S. at —, 120 S.Ct. at 1099 (citations omitted, emphases added). *See also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) ("the contention ... that the administrative body lacked power over the subject matter" does not excuse a failure to exhaust).

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[26]Other claimants, who had presented their claim to the agency but had not pursued all administrative appeals, were excused because the *Secretary* had waived further exhaustion, a decision which the Court held was within his statutory powers. 422 U.S. at 765-67.

Many of the statutes involved in the above cases cast their exhaustion requirements in terms of a limitation on the subject-matter jurisdiction of the federal courts. *E.g., Salfi*, 422 U.S. at 763-64. As several courts have noted, Section 1997e(a) is not a jurisdictional limitation, *Nyhuis v. Reno*, 204 F.3d at 69 n.4 (collecting cases), but this makes no difference to the analysis. The power to prescribe the procedural requirements under which claims may be heard in the federal courts is vested in Congress, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. at 501, and "a ... court may not disregard these requirements at its discretion" whether or not they are "jurisdictional in the strict sense of the term." *Hallstrom v. Tillahook County*, 493 U.S. 20, 31 (1989) (failure to comply with 60-day notice provision for suit under Resource Conservation and Recovery Act required dismissal).

As we demonstrated in the preceding sections of this brief, the language, history, structure and purposes of Section 1997e and the PLRA all compel the conclusion that Congress intended to impose a broad exhaustion requirement on prisoners. As amended by the PLRA, Section 1997e's simple command — "[n]o action shall be brought ... until such administrative remedies as are available are exhausted" — is similar to the language of other laws which the Court has described as "sweeping and direct,"[27] *Weinberger v. Salfi*, 422 U.S. at 757; "could

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[27]"No action shall be brought ... under [28 U.S.C. § 1331] to recover on any claim arising under [Title II of the Social Security Act." 42 U.S.C. § 405(h), *quoted in Weinberger v. Salfi*, 422 U.S. at 756.

not be clearer,"[28] *Hallstrom v. Tillahook County*, 493 U.S. at 26; and "unambiguous."[29] *McNeil v. United States*, 508 U.S. at 111. In such cases, the courts "are not at liberty to create an exception where Congress has declined to do so." *Hallstrom*, 493 U.S. at 27.

The exhaustion requirement in Section 1997e(a) represents a policy judgment by Congress to strike a new balance between keeping open the federal courts for the vindication of prisoners' federal rights, and "avoiding burdening the federal courts with excessive numbers of [prisoner] suits." *Hallstrom*, 493 U.S. at 29. As the Court has pointed out in this very context,

> the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.

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[28]"No action may be commenced ... prior to sixty days after the plaintiff has given notice." 42 U.S.C. § 6972(b)(1), *quoted in Hallstrom v. Tillahook County*, 493 U.S. at 25.

[29]"An action shall not be instituted ... unless the claimant shall have first presented the claim to the appropriate Federal agency," *quoted in McNeil v. United States*, 508 U.S. at 109 n.4.

Patsy v. Bd. of Regents of Fla., 457 U.S. at 513 (discussing pre-PLRA version of § 1997e(a)). In fact, the Court recently refused to sanction special judicially-created rules for prisoner cases, precisely because Congress had already acted in the PLRA. *Crawford-El v. Britton*, 523 U.S. 574, 596-97 (1998).

As the Court pointed out in *Crawford-El*, "the PLRA is already having its intended effect." *Id.*, at 597. Prisoner civil rights suits dropped from 41,215 in fiscal year 1996 — the year the PLRA was enacted — to 28, 635 the next year, a drop of 31 percent. *Id.*, at 597 n.18, *citing* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1997 Report of the Director 131-132 (Table C-2A). That decline has continued, although at a slower rate, to 26,462 cases in fiscal 1998 and 25,694 cases in fiscal 1999. Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1999 Report of the Director 140 (Table C-2A).

Petitioner is simply dissatisfied with the balance struck by Congress in the PLRA, and invites the courts to strike a new balance, substituting case-by-case judicial determinations of "futility" for the PLRA's broad requirement of exhaustion. But "'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *Hallstrom v. Tillahook County*, 493 U.S. at 31, *quoting Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). If changes are to be made in the balance struck by the PLRA, those changes should come from Congress.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

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January 19, 2001

APPENDIX

UNITED STATES CODE, TITLE 42 (1994 ed., Supp IV)

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who

is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under

section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable,

the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) Definition

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

UNITED STATES CODE, TITLE 42 (1994 ed.)

§ 1997e. Exhaustion of remedies

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

(b) Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards

(1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and

implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide--

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c) Procedure for review and certification of systems for resolution of grievances of confined adults for determination of compliance with minimum standards; suspension or withdrawal of certification for noncompliance; development, etc., by Attorney General

(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b) of this section or are otherwise fair and effective.

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b) of this section or is no longer fair and effective.

(d) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997a or 1997c of this title.

Supreme Court, U.S.
FILED
DEC 14 2000
OFFICE OF THE CLERK

(9)

No. 99-1964

In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 5, 2000
Certiorari Granted October 30, 2000

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6. Grievance Response, dated Mar. 5, 1997, attached as Exhibit to Complaint 12

7. Grievance, dated Feb. 19, 1997, attached as Exhibit to Complaint 13

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9. Affidavit for Show of Cause for Emergency Preliminary Injunction and Protective Order, filed Apr. 28, 1997 17

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16. Grievance, dated June 21, 1997, attached as Exhibit to Motion to Amend Complaint 36

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The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to Petitioner's printed Petition for Writ of Certiorari.

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24. Order of the United States District Court for the Middle District of Pennsylvania denying motion to amend complaint, dated July 17, 1997..... 29a

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Booth v. Churner et al.

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
No. 97-CV-611

Date	Event
April 21, 1997	Complaint alleging violation of civil rights – prison conditions.
April 28, 1997	Motion by plaintiff Timothy Booth for protective order.
May 7, 1997	Motion with brief in support by plaintiff Timothy Booth to proceed in forma pauperis and for appointment of counsel with proposed order.
May 12, 1997	Motion by plaintiff Timothy Booth to proceed in forma pauperis and for appointment of counsel.
May 19, 1997	Motion by plaintiff Timothy Booth for affirmative order records and plaintiff petition to show cause.
May 20, 1997	Amendment to specific relief by plaintiff Timothy Booth to complaint.
May 30, 1997	Order by Judge William J. Nealon – 1) The complaint is dismissed without prejudice for failing to exhaust administrative remedies; 2) the motions filed subsequent to the filing of complaint are dismissed as moot; 3) the Clerk of Court is directed to close this case. Case terminated.
June 18, 1997	Motion by plaintiff Timothy Booth for preliminary injunction.

June 18, 1997	Affidavit of Timothy Booth with exhibits attached.
July 3, 1997	Order by Judge William J. Nealon that: 1) Doc 18 is construed as a motion for reconsideration and a brief in support thereof; 2) Booth's motion for reconsideration is denied.
July 7, 1997	Motion by plaintiff Timothy Booth to amend complaint.
July 8, 1997	Order by Judge William J. Nealon finding motion for appointment of counsel moot; finding the motion for preliminary injunction moot, as plaintiff's case was closed on 5/30/97.
July 11, 1997	Notice of appeal by plaintiff Booth from 7/3/97 order.
July 17, 1997	Order dismissing motion as moot, as plaintiff's case was closed 5/30/97.
August 6, 1997	Notice of appeal by plaintiff Timothy Booth from 7/17/97 order.
October 10, 1997	Notification by Circuit Court of Appellate Docket Number 97-7487.
October 10, 1997	Notification by Circuit Court of Appellate Docket Number 97-7488.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. Nos. 97-7487, 97-7488

Date	Event
September 9, 1997	Notice of appeal filed by Timothy Booth.
September 9, 1997	Civil case docketed.
September 9, 1997	Order consolidating appeals at Nos. 97-7487 and 97-7488.
October 9, 1997	Brief on behalf of appellant Timothy Booth (pro se). Certificate of service dated 10/9/97.
December 5, 1997	Motion by appellant Timothy Booth for preliminary injunctive transfer for protection.
March 6, 1998	Order terminating appeal without judicial action pursuant to Local Appellate Rule 3.3 and Local Appellate Rule Misc. 107.1(a).
March 6, 1998	Affidavit by appellant in support of motion to proceed in forma pauperis.
April 1, 1998	Motion filed by appellant Timothy Booth to reopen appeal.
April 15, 1999	Order granting motion to reopen; directing that Clerk appoint counsel.
April 15, 1999	Order appointing Nancy Winkleman, Esq. to represent appellant.
June 1, 1999	Brief and appendix on behalf of appellant Timothy Booth. Certificate of service dated 6/1/99.

July 13, 1999	Brief on behalf of appellees W. Gardner, Rikus, Workensher and Churner. Certificate of Service dated 7/13/99.
July 13, 1999	Reply Brief on behalf of appellant Timothy Booth. Certificate of service dated 7/30/99.
September 27, 1999	Argued before Becker, Chief Judge, McKee and Noonan (sitting by designation), Circuit Judges.
March 7, 2000	Opinion (Becker, Authoring Judge, McKee, and Noonan, Circuit Judges), with a separate concurring and dissenting opinion by Judge Noonan.
March 7, 2000	Judgment affirming the orders of the district court. Costs taxed against the appellant.
March 29, 2000	Mandate issued.
May 11, 2000	Reported at 206 F.3d 289.
June 12, 2000	Notice from Supreme Court of United States advising of petition for writ of certiorari filed by appellant Timothy Booth at Supreme Court number 99-1964.
August 28, 2000	United States Supreme Court letter dated 8/22/00, requesting the entire record.
September 12, 2000	Certified copy of briefs, appendices and partial proceedings sent to Clerk of Supreme Court of the United States.

November 2, 2000 United States Supreme Court order dated 10/30/00 at Supreme Court number 99-1964, granting petition for writ of certiorari by appellant Timothy Booth in nos. 97-7487, 97-7488.

FORM TO BE USED BY PRISONERS
IN FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 USC § 1983

Filed April 21, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Timothy Booth
CN-3556

(Enter above the full name of the plaintiff or plaintiffs in this action)

vs. 3: CV 97-0611

c/o Churner
Sgt. Workensher
Lt. Rikus
Capt. W. Gardner
(Enter above the full name of the defendant or defendants in this action)

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ✓ No

B If your answer to A. is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline).

2 Austin v. D.O.C. Class Action also

1 Crule and unusual punishment
Indiff. Medical

1. Parties to this previous lawsuit

   Plaintiffs: Timothy Booth

   Defendants: Sgt. Robinson c/o Thomas Warden Biviano Super. Morgan M. Weaver next Super Morgan M. Knott Program Dir.

2. Court (if federal court, name the district: if state court, name the county).

   Huntingdon Pa County

3. Docket Number Haven't recieved the other. unsure of its number

4. Name of judge to whom case was assigned:

   Unknown

5. Disposition (for example: was the case dismissed? Was it appealed? Is it still pending?)

   Still pending

   Still pending

6. Approximate date of filing lawsuit: 3-97 1-97

7. Approximate date of disposition: Unknown

Place of Present Confinement: Smithfield Prison Huntingdon Pa.

A. Is there a prisoner grievance procedure in this institution? Yes ✓ No

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ✓ No

C. If your answer is YES:

   1. What steps did you take? Complained and ask for help.

2. What was the result? Refuse or disimmed and covered up.

D. If your answer is NO, explain why not: There isn't any help because of retaliation because I spoke up about abuse and condition

III. Parties

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any)

A. Name of plaintiff Timothy Booth CN-3556
Address 1120 Pike Street Huntingdon PA 16652

(In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants).

B. Defendant c/o Churner is employed as Correctional officer at

C. Additional Defendants: Sgt. Workensher and Lt. Rikus

Also Captin Garnder, Superindtent Morgan

IV. Statement of Claim:

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary).

RELIEF

State briefly exactly what you want the court to do for you.

Make no legal arguments. Cite no cases or statutes.

First protective order for transfer to another prison please my safety and life is at stake order preliminary injunction

* * *

[Grievance Response Attached as Exhibit to Complaint]

DC-804
PART II

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. BOX 598
CAMP HILL, PA 17001-0598

OFFICIAL INMATE GRIEVANCE INITIAL REVIEW RESPONSE			GRIEVANCE NO. SMI-079-97
TO	INSTITUTION	QUARTERS	GRIEV.
T. Booth	SCI-Smithfield	H-BLK.	DATE
CN3556			3-12-97

You mentioned no specific allegations in your grievance, therefore, staff had no basis to conduct an investigation.

It is noted, however, that you have claimed abuse by officers in the past and investigation has always reflected false claims. There is no indication that you have been abused in this case either. Your grievance is dismissed.

* * *

Refer to DC-ADM 804 Section VIII, for instructions on grievance system appeal procedures.	SIGNATURE OF GRIEVANCE COORDINATOR /s/ Sharon M. Banks	DATE 03/13/97

* * *

[Handwritten Attachment to Complaint]

* * *

3. No physical brutality by prison staff
   8th Amendment – cruel and unusual punishment

* * *

4. Decent Conditions in Prison

* * *

5. The Right to decent medical care

* * *

6. Injunction

   *Prison being locked up without any hearing (danger of re-current violation)

   *State violates federal right liable to injured suit in equity an action at law (M. Damages $) action at law and a suit equity

   A recurrent violation *Inmates of Attica v. Rockefeller,* 453 F.2d 12, 23 (2nd Cir. 1971)

   * "No adequate remedy at law" Also "irreparable injury"

* * *

7. Affirmative Orders

* * *

Damages money

A. Compensatory damages (pain and suffering)
   Nominal Damages (mental anguish)

* * *

3. Damages from the Government

* * *

[Grievance Response Attached as Exhibit to Complaint]

DC-804
PART II

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. BOX 598
CAMP HILL, PA 17001-0598

OFFICIAL INMATE GRIEVANCE INITIAL REVIEW RESPONSE			GRIEVANCE NO. SMI-103-97
TO	INSTITUTION	QUARTERS	GRIEV. DATE
T. Booth CN3556	SCI-Smithfield	H-BLK.	3-05-97

This grievance is a duplicate of your grievance SMI-079-97 received on 2/14/97. Grievance SMI-079-97 response was furnished on 2/21/97. In both grievances you request protective custody. You are already in disciplinary custody which is, a very secure housing. Your grievance is denied.

[Handwritten on form] This is were the beating and assaults happened and are happening to me.

* * *

Refer to DC-ADM 804 Section VIII, for instructions on grievance system appeal procedures.	SIGNATURE OF GRIEVANCE COORDINATOR /s/ Sharon M. Banks	DATE 03/05/97

[Grievance Attached as Exhibit to Complaint]

PART 1 COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. Box 598
Camp Hill, PA 17001-0598

OFFICIAL INMATE GRIEVANCE	GRIEVANCE NO. SMI-108-97
TO: GRIEVANCE COORDINATOR Mr. Mathis	INSTITUTION SCIS
	DATE 2/19/97
FROM: (Commitment Name & Number) Timothy Booth CN-3556	INMATE'S SIGNATURE /s/ Timothy Booth
WORK ASSIGNMENT None	QUARTERS ASSIGNMENT H

INSTRUCTIONS:

1. Refer to the inmate handbook Page 12 and DC-ADM 804 for information on the inmate grievance system.

2. State your grievance in Block A in a brief and understandable manner.

3. Next, you are required to list in Block B the specific actions you have taken to resolve this matter. Be sure to include the identity of staff members you have contacted.

A. Brief, clear statement of grievance:

I put in a slip to Capt. Glenny to be seen for and assault that happened but was never seen.

I'm asking to be heard for this wrong. Also I'm seeking to utilize DC-ADM-004. I'm request this right as provided by the inmate hand book. Please I have the right to be in a place that my safety is not in jeopardy.

B. Actions taken and staff you have contacted before submitting this grievance:
[Illegible]

Your grievance has been received and will be processed in accordance with DC-ADM 804.

/s/ Sharon M. Banks — 2/25/97
Signature of Grievance Coordinator — Date

[Handwritten Attachment to Complaint]

To Whom It May Concern

4-96 – I was assaulted by a Sgt. Robinson and a c/o name Thomas. As of that assault I've a shoulder that slips in and out from this assault. I was seen by the a doctor and was told I would get a operation on my shoulder. I waited and complained but never did I receive it; as a result of my complaining on 2-97. I was told that I wouldn't get the operation because of some administrative problem. Deliberate indifference to my shoulder and back.

On 2-6-97 I'd some problem with one of the officer who assaulted me. I was not given dinner meals a couple of times also I throw water on that officer for a few words he spoke and I was taken out of my cell handcuffed. I was taken to the storage room where officer Thomas threw a cup cleanning material in my face and then placed in an shower still cuffed until they search my I was written up for attempting to spit on this officer.

On 2-7-97 I called Sgt. White and ask could I see a Lt. Rikus about get my tray. Lt. Rikus came on the block and went into the property room – words was exchanged and Lt. Rikus said he should back hand slap me I said go ahead. He grabbed my arm and shoved me into the shelf in the storeage room. Sgt. White look on, but officer Thomas pushed me into a door. I hit the side of my face on the shelf. White then grabbed my arm a took me out of the room and place me in my cell and close the door. He told Thomas to uncuff me. He grabbed the cuffs and began to tighten and twist them. I put my foot on the cell door and pushed off I got free of Thomas and he shut the

tray slot and I was left like that for 1/2 hour. Then c/o Walton came and uncuffed me and I ask to see an doctor. He was brought and looked at my face and the bruises on my wrists. I got pain reliever and nothing else this cause my shoulder to hurt more.

I was moved of that unit about 3 weeks later and moved to another unit. On 3-23-97 at 7:00 these of officer came to my cell and ask was me and my cell partner was ready to go to the law library. They strip search my cell partner first and then took him into the library. They took me into the room to get search. c/o Kuhan, c/o Chuner and Sgt. Workensher, c/o Chuner told me to face the wall I did as I was told. He uncuffed one hand and ask did I spit in officer White face I said no. He then punched face and mouth. The other watched and they grabbed me. c/o Kuhan put me in a choke hold and forced me to the floor. Sgt. Workensher put his hand on my back and cuffed the other then took me back to my cell. I ask to see a doctor because I was in pain because of the attack in which my mouth was busted open.

The doctor came and looked at me. He order the guards to take me over to the hospital for me to get 3 stitches in my mouth.

I need out of this jail before the kill me, and I want each and every officer to be punished for assaulting me.

Please I'm in fear of my life. Timothy Booth CN-3556

AFFIDAVIT FOR SHOW OF CAUSE FOR EMERGENCY PRELIMINARY INJUNCTION AND PROTECTIVE ORDER

Filed April 28, 1997
[Caption Omitted in Printing]

* * *

I petition to the court under Rule 65(c) of the Federals Rules of Civil Procedure a request for a TRO and protective order with a need also for the court to grant a immediate preliminary injunction.

I submit to the court truthful facts to support my need for this petition for emergency help and relief from the courts.

1. I've been brutally assaulted 3 different times in under an year time span. Dates are 4-27-96 & 2-7-97 & 3-23-97.

2. Each beating occurred on the security segregation housing unit (aka R-H-U) inside of this unit property storeage room (back room).

3. Each assault occurred on 2 to 10 pm shift. Time approx. 8:30 pm & 7:30 pm & 7:10 pm. All beating on my person was done with my hands cuffed behind my back.

4. Injuries and date: 4-27-96 lump on head, neck and back pain and trouble along with a dislocated shoulder that as of todays date 4-27-97, still spasms and slips out and sometimes back into the socket (permanent damage from beating and deliberate medical indifferences).

5. Injuries and date: 2-7-97 briused and swollen face and wrists (5 days swollened). Also with aggravated shoulder injury.

6. Injuries and date: 3-23-97 busted mouth that required 3 surgical stitches to close and also back pain, with aggravated shoulder injury permanently scarred (damaged).

* * *

I'm imploring to the Court to grant this TRO and preliminary injunction (to be transferred to any other prison for protective custody reasons) (To be free from beating and abuse of retaliation while the Courts consider my civil complaints)

Case cite ex: No adequate remedy at law (3 brutal beatings with irreparable injuries. "Danger of recurrent violations and danger of suffering more abuse along with further irreparable permanent injuries. Inmates of Attica v. Rockefeller, 453 F.2d 12, 23 (2d Cir. 1971).

I seek emergency relief for the purpose of saving my life and I'm asking to transferred to another prison for the duration of my civil complaint and if it please the courts a permanent transfer "to insure that the administrators whom faced with possible scrutiny by state officials (government) and the public and even the courts, where my basic fundamental, constitutional rights have been abridged at Smithfield Prison. Another state prison will act fairly. Recorded in this Affidavit for a show of cause for a emergency preliminary injunction and protective order including an TRO contains enough evidence of

a right to be transferred to a different prison under Pennsylvania Statutes or administrative regulations. I'm asking the courts to not leave me at the mercy of the Commonwealth Department of Corrections (Smithfield State Prison).

By leaving me at the mercy of Smithfield Prison, the court will also impose an atypical and significant hardship on me (condoning these senseless beatings) in relation to other prisoners in different state prisons ordinary incidents of prison life; for the 8th Amendment extend to the whole prisoner as a human being (assualts with waton infliction of mental anguish and stress. Also, retaliatory torture, torement, harrassment, punishment for the very purposes of causing prisoner harm (myself).

* * *

I've suffer 8 injuries at the hands of Smithfield staff along with two permanently damaged body parts.

neck, head, back, face, both wrists; permanently (lip = lump and scar also shoulder that comes out of socket almost on a daily bases.)

I've had my legal mail takened (copies sent to library for photocopying) and destroyed. My outgoing legal mail tampered with and not send out. Also my legal manual taken and witheld then given back. My legal mail openned not in my presense and then taped shut.

I'm not allowed any library time and not allowed to get help from law clinic workers or Jail house lawyers nor the library par-a-legal.

* * *

Sir: This officials known what's happened and what is continuiously happening to me Abuse, Beating, Indifferences, Conditions in segregation. I put forth here to the court that Smithfield uses malevolent touches (beatings) and turns a blind eye and a deaf ear to my safety, rights and life for I do fear that the next beating I may not live through; because they beaten upon me some much that they have no fear of ever being held accountible for their action. Please Your Honor, don't let Smithfield kill me, Sir. I've been abused and punished more than any law would allow.

* * *

Defendants in this petition and complaint

Booth v. Churner, (3-97-CV-611)

2 c/o Riekirt

3 c/o Kuhn

4 Sgt. Workensher

5 D.W. Morder

6 D.W. Biviano

7 Captin Tennis

8 Captin Gardner

9 Captin Glenny

10 Superintendent Morgan

Permanent Damage to lip (scar and lump)

Seeking in award total for nomial punitive exemplary and compensatory $400.000

Date 4-27-97 Timothy Booth (CN-3556)

* * *

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL AND PRELIMINARY INJUNCTION FOR PROTECTION

Filed May 7, 1997
[Caption Omitted in Printing]

* * *

3. The action seeks to enjoin those Defendants from (the wrongful actions giving rise to this suit) and seeks damages in the amount of (CV-611 = $400.000), (CV-630 = $300.000) (CV-629 = $300.000) for deprivation of plaintiffs civil rights (cases in Huntingdon Court (97-499 = $750.000).

* * *

Preliminary Injunction Support And Show of Causes

* * *

8. I have been assaulted 3 time in Smithfield Prison.

9. The 3 assaults occured on the security segregation unit.

10. The 3 assaults occured in under a year time dated assaults (1) 4-27-96. (2nd) 2-7-97. (3rd) 3-23-97.

11. Each assault occured at the 2 pm to 10 pm shift.

12. The times of these assaults (1st) 8:30 pm (2nd) 7:30 pm and (3rd) 7:10 pm

13. Each assault occured in the back of the property storeage room.

14. Each assault, beating, attack was inflicted on plaintiff whiled his hands were cuff behind his back.

15. Each assault was inflicted with an Smithfield correctional supervisor whom took part in each (3) beating. (1st) 4-27-96 Sgt. Robinson. (2nd) 2-7-97 Lt. Rikus (3rd) 3-23-97 Sgt. Workensher.

16. Each assault that occured I was seriously injured (1st) 4-27-96 lump on head slight concussion, neck pain, back pain and trouble, a dislocated shoulder with an torn rotary cup, shoulder is permanently damage from beating and also of today 4-30-97 it still slips out of its socket (delibrate medical indifferences. (2nd) Briused face that swolled for 5 days along with bruised and swollen wrists (pains for days) also re-injured my shoulder from the cuffs being pulled and twisted behind my back while on my wrists (2-7-97). (3rd) Busted mouth that took 3 surigical stiches to close wound (permanently scarred with lump in mouth. Back pain and re-injured shoulder. (3-23-97)

17. I had my legal mail opened not in my presene then taped shut, ex: one from Scranton Court, and A.C.L.F. and Pa. ins. law proj.

18. My mail not being sent out and legal mail taken.

19. Legal letter sent for coping destroyed.

20. Not allowed library time or any assistance from anyone; no par-a-legal, not allowing help from jailhouse lawyer or law library worker (inmate).

21. Abused for harm and suit (intentional infliction of pain/anguish.

22. Commissary taken and witheld.

23. Denied food.

24. Cleaning fluid thrown in face.

25. One officer beat me twice, Thomas, 4-27-96 and 2-7-97 and 3-23-97 was due to 2-7-97 retailition (complained and argue right).

26. Denied due process and wittiness in misconduct hearing.

27. Harrassed (suit).

28. Tortured and toremented (suit).

29. Punished (suit).

30. Had sign put on my door saying "cry baby" (internal stress).

31. Intentional blocking access to court.

32. Handcuffed and put in shower for an 1/2 hour.

33. Cuffs tightened, pulled back and up and twisted any lefted in that painful way for 1/2 hour.

I seek emergency relief by getting an court order protection transfer to any other prison for safety and lifed.

* * *

PETITION FOR AFFIRMATIVE ORDER "RECORDS"
ALSO RELIEF PLAINTIFF SEEKS

Filed May 19, 1997
[Caption Omitted in Printing]

* * *

Plaintiff asks to Courts to stop Smithfield Staff Retaliation on him also to stop the impairing of Plaintiff access to Court (no assistance to collect statement, in filing paper, no useage of R.H.U. Law Library and Tampering with outgoing and incoming legal mail.

* * *

4. 97-CV-00629 Plaintiff (Affirmative Order)

Damages $300.000 Relief

1. Request to interview wittiness for H.I unit and R-H-U along with general population on law library condition and useage.
2. Get statement for Jailhouse lawyer and law clinic worker
3. Have the Court to find Smithfield in contempted of court on Bounds v. Smith, Austin v. Depart. of Corr, Tillery v. Owens, condition
4. To upgrade inadequate segregation unit library and improve condition in segregation.
5. To expediate the hiring of mandated proffessional civilian par-a-legal (Hamilton v. Love, 358 F.Supp 338 (E.D. Ark 1973) = #1-5.

CONCLUSSION

A. Plaintiff ask to be transferred to any prison for protection against beating, abuse and conditions case ex:

Inmates of Attica v. Rockefeller; Danger of Recurrent Deprivation of Constitutional Rights. 3 Beating in under an year Times, with to permanent injuries.

B. Their is know remedy at law and for the two permanent injuries; there's not anything that the Prison (Smithfield et al Defendant) or the Court can do to ever repair the damages the Plaintiff suffered at the hands of the Defendants.

C. Plaintiff fear for life, statement to the court, (retaliation) well being, safety, and having access to the Courts blocked, abridge, tampered with (can not get copies of anything that sent (lost missing, Destroyed) hindering Plaintiff 4 Civil Action Law Suit by Smithfield officers civillian staff and top officals.

1. 97-CV-00499/710 Plaintiff Timothy Booth

Damages 750.000 Relief

Request an Affirmative Order to get Smithfield to release Disclosure and Discovery Records.

* * *

2. 97-CV-00611 Plaintiff Timothy Booth

Damages 400.000 Relief

Requesting an Affirmative Order to get Smithfield to Release for Disclosure and Discovery (Record)

* * *

3. 97-CV-00630 Plaintiff Timothy Booth

Damages $300.000 Relief

Requesting an Affirmative order to get Smithfield to release for Disclosure and Discovery Records

* * *

PLAINTIFF PETITION TO SHOW CAUSE FOR
1. APPOINTMENT OF COUNSEL
2. TO KEEP TOP OFFICIALS AS DEFENDANTS
3. AMENDMENDING RELIEF PLAINTIFF SEEKS

Filed May 19, 1997

* * *

1. Relief seeking from Courts - 00499-710

A. Any injunction to stop the continuous beating (4-27-96 1st)

B. Affirmative order to get operation

C. Transferred to any other for protection

D. Appointment of counsel to take over, four Civil Actions Suits

E. Money damages $750.000 (permanent damage injury.

No remedy at law: 4-27-96

2. Relief from Courts - 00611

A. Appointment of counsel

B. Transferred out of Smithfield, danger of recurrent violation (Beating 3rd 3-23-97)

C. Any injunction to help Plaintiff; so that the prisoner will not be beaten again

D. Money Damages $400.000 (permanent scarring, lump

No remedy at law 3-23-97

3. Relief from Courts – 00630

A. Appointment of counsel

B. Transferred out of Smithfield permanently (re-current violation (3 beatings in under year time)

C. money damages $300.000

No Remedy at Law 2-7-97

4. Relief from Courts – 00629

A. Affirmative order ex purpose (improve R-HU Law Library. 2 allow inmates law clinic worker in segreg. Law library. Also Jailhouse law library R-H-U fine Smithfield officials in contempt of Court in Austin v. Dept. of Correction. (Par-a-legal) Affirmative order hire par-a-legal, award plaintiff an thousand days a that Top official been in contempt. (3-1-97)

Money Damages $300.000 conditions.

No remedy at law. The prison and Defendant can never repair the damages or repay it by the Courts.

* * *

PLAINTIFF AMENDMENT TO SPECIFIC RELIEF

Filed May 20, 1997
[Caption Omitted in Printing]

1. Protective order to be transferred to any other jail

2. Preliminary Protection injunctions to be transferred to any other prison to stop these beating.

* * * *

6. Permanent injunction to be removed from Smithfield

7. Awarded damages $400.000 for nom. pun. exemp. and compens.

* * *

Mental Stress
And
Anguish

On 3-23-97

I and my cell partner were asked if we wanted to go to the R-H- U inadequate law library. We said yes to this offer because you only get to go once a month for an hour at the most. At 9:40 pm officer Chuner, Kuhn and Reikirt, Sgt. Workensher cuffed our hands behind our backs then he put me into the shower so that my cell partner could be stripped searched. I want to say that I'd ask my cell partner where he was searched that's in the front part of the storeage room where they hold hearing A.K.A. The Sodume and gormora inquisition chamber.

I was taken into the back part of the storeage room. There was four correctional officers in there. I was told to face the cabinet. I did what I was told and officer Churner started to unfasten my cuff on the right hand. He asked if I spit on Officer White on another unit. I said no and I wasn't write up for spitting on him I threw water I think c/o Riekirk told c/o Churner this. Either and Riekirk was on vacation and came back then passed on wrong hearsay.

As I said c/o Churner asked this question and I answered negative. He then punched me in my mouth. I slumped somewhat from this punched and Kuhn rushed me and put me into a choke hold, then forced me down onto the floor Sgt. Workensher grabbed my arms. Then twisted my arm to cuff the one that was lose (the Left one was still on. I'd my mouth busted open for no Reason at all. No arguing or asking for anything at all. This maleviolent and Barbaric assault and beating was for retaliation purpose because of a lying c/o staff member who had his story wrong (Riekirt or Either LT. Rikus). I'm in mortal fear for my life here. 3 beating is enough. 4-27-97, 2-7-97 and this 3-23-97 Please I'm stressed because of abuse and conditions here in the R-H-U (segregation) and Smithfield When is enough beating enough The staffs say when I'm dead" They ask you were do you want your body sent.

Somerset, waynemart please send me before they kill me; intentional infliction of pain and mental anguish; These have been and is still given to me on a daily bases.

* * *

Dr. Yen don't give a hoot; say as much to me about Help. Medication and Milk not any kind of therapy for the intentional stress and anguish the staff has and is inflicting on me.

Dated 4-30-97

* * *

PETITION FOR EMERGENCY INJUNCTION AND SHOW OF CAUSES FOR TEMPORARY RESTRAINING ORDER

Filed June 18, 1997
[Caption Omitted in Printing]

Plaintiff whoms Petitioning Pro-se Respectfully prays that this Court grants him immediate and emergency help; with relief by issuing a Temporary Restraining Order against all Defendants in this suit along with their successors in office, agents and all other persons that's in active concert and participating in such manners that will be foremetioned.

Plaintiff comes expeditiously to the Courts for protection by pleading for a preliminary injunction to be issued against his Defendants and other prison employees that are in active concert against Plaintiff. These Defendants are participating in crule harassment, punishing sadistically and blanton theartening Plaintiff with more physical violence; these retaliatory continuous actions are because of Plaintiff civil action suit.

* * *

Plaintiff seeking a remedy from all the Defendants would be meritless, frivolous, and in vain because of the Denial of Protection or help from Plaintiff Top Officials Defendants are continuously reconcurrent

* * *

Plaintiff state to the Courts there is no remedy at law; two parts irreparable injuries 1st permanent scarring and lump from the malicious beating itself.

* * *

Plaintiff ask the Court to Transfer him for Protection from further abuse.

* * *

Plaintiff has had his legal mail oppened not in his presence repeatedly by Defendants and other prison employees.

* * *

Plaintiff has shown to the Court in this Show of Cause and Petition for T.R.O. and a Emergency preliminary injunction that the state prison Smithfield and all of the Defendants in this Civil action Suit have blatonly and malicously violated his legal constitution rights. (All Exhibits). and are all in concert to do everything that unconstitutional to hinder Plaintiff access to your Courtroom.

* * *

Plaintiff cites Bound v. Smith 430 U.S. 817 (1977) at 824-825 indigent inmates must be provided at state expense with paper (not given-denied) and pen (what good is it without paper) to draft legal documents and stamps to mail them out. Please refer T Exhibit B-2.

Plaintiff cannot send anything to be copied because Defendants and other employee destroy any that sent back from library. Plaintiff sent letter for copying; consisting fact and statements of beating. This letter was going to be sent to Scranton Times and the U.S. Todays newspaper Citation Procunier v. Martinez 416 U.S. 396 (1974)

at 413) Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome statements and Mujahid v. Summers, 807 F.Supp 1505 (D. Hawaii 1992)

Plaintiff pleads to the Courts to be transfer for protection and to put a stop to this abuse. For the in no remedy at law and when Plaintiff is vindicated. Their is absolutely nothing the Court can do to adequately repair or repay him for his pain and suffering citation

* * *

Compensatory, nomial, punitive and exemplary.

* * *

MOTION TO AMEND COMPLAINT

Filed July 7, 1997
[Caption Omitted in Printing]

I Plaintiff in the Brutality Civil Suit of Crule and Unusual punishment would like to add correctional officer Broombaugh as a Defendant due to set forth civil rights violation on the night of 6-23-97 officer Kuhn which is already a Defendant in this case and officer Broombaugh shoved me face first into the outside of cell 115 (inmate Tyrone Wright CS 2448 cell 115) Door twice and proceeded to tighten the cuff to the maxium for torture and punishment. This assault was done for retaliation purpose to cause me intentional pain and suffering.

I Plaintiff has repeatedly seeked help from the Court for protection by transfer to any other prison for the duration of my case 3:97-CV-0611 and other two Brutality Civil Suits 3:97-CV-0710 and 3:97-CV-0630. But help from the Court is not forthcoming. I was in this case beaten 3:97-CV-0611 by officer Churner, Kuhn, Riekirt, Sgt. Workensher on 3-23-97 then to be assaulted on 6-23-97 by officer Broombaugh and Kuhn again is to much while Sgt. Workensher looked on and Captin Gardner stood in the guard both and watched.

* * *

I Plaintiff asked the Top prison offices for protection on 2-9-97 and was denied and was beaten again on 3-23-97 and asked for help again on 6-21-97 and was beaten again on 6-23-97. I plead to the Courts to transfer me out of Smithfield to stop these senseless criminal Civil Rights Violation Beatings.

I Plaintiff can get no remedy of Protection from Top prison officials. Because they are also Defendants in this case and other civil rights cases against them no good faith in Beating and Denial of Protection against further Beatings.

* * *

Plaintiff state that if the Court do not transfer him he will be beaten again by Defendants. I've Been Denied showers, food, usage of mini-law library. I've also had legal mail taken, destroyed, opened and pre-read not in my presence then resealed, commissary taken and denied. Furthermore I've Been Beaten Twice By one Defendant and have had their supervisor help and watch my Being Beaten.

I Plaintiff seek an permanent award damage in this Civil Case for the amount of 1.400.000.00 on (3:97-CV-0611) and an Emergency Transfer for Duration of these Suits.

* * *

[Grievance, dated June 21, 1997, attached as Exhibit to Motion to Amend Complaint]

DC-804
PART 1

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. Box 598
Camp Hill, PA 17001-0598

[Handwritten notes: Support for transfer request protection and is denied; request for protection on 6-21-97 beaten again on 6-23-97]

OFFICIAL INMATE GRIEVANCE	GRIEVANCE NO. SMI-286-97
TO: GRIEVANCE COORDINATOR Ms. Burks	INSTITUTION SCIS
	DATE 6/21/97
FROM: (Commitment Name & Number) Timothy Booth CN-3556	INMATE'S SIGNATURE /s/ Timothy Booth

* * *

A. Brief, clear statement of grievance:

I've been denied repeatedly shower, food, library usage, mail tampered with legal letter (material destroyed because of my civil action suit against Robinson, Thomas, Rikus, Churner, Workensher, Kuhn, Riekirt, Weaver, Knott, Morder, Biviano, Morgan, Tennis, Glenny, Gardner, I've been bogusly written up, harrassed, punished, toremented, retaliated against. I want protection (2 to 10 pm shift will either beat me again or kill me. I'm in fear for my life, 3 beating is enough and the top offical (your boss knews. (Remember denied me protection after 2-7-97

beating and I was beaten again, 3-23-97, because of this denial) move me away from, Workensher, Kuhn, Churner - suggest 3 block as protective custody

B. Actions taken and staff you have contacted before submitting this grievance:

I written to you and you didn't care then and your not a defendant. So help me to be free from abuse and beating

Your grievance has been received and will be processed in accordance with DC-ADM 804.

/s/ Sharon M. Banks — 6/25/97
Signature of Grievance Coordinator — Date

[Grievance, dated June 23, 1997, attached as Exhibit to Motion to Amend Complaint]

DC-804
PART 1

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. Box 598
Camp Hill, PA 17001-0598

[Handwritten note: Recurrent brutality beaten again after being denied protection]

OFFICIAL INMATE GRIEVANCE	GRIEVANCE NO. SMI-286
TO: GRIEVANCE COORDINATOR Ms. Burks	INSTITUTION SCIS
	DATE 6/23/97
FROM: (Commitment Name & Number) Timothy Booth CN-3556	INMATE'S SIGNATURE /s/ Timothy Booth

* * *

A. Brief, clear statement of grievance:

On 6-23-97 while c/o Broombaugh took my cell partner belonging to him. I had my cuffs that were on tighten to the maxium, I had my face shoved in to the next cell door; because i fasted and my food (two hot dog were taken) I complained. Broombaugh and Kuhn face shoved, messed harshly and the handcuffs tighten. After it was over I put my cigg. out of the door to get a light Sgt. Workensher took my cigg and give it to my old cell partner and while he took the two hot dogs and cake, he took 2 of my legal letters (I wan't protection 4 time physical abused

B. Actions taken and staff you have contacted before submitting this grievance:

Ask you for protection was denied, look why not move me. DC-ADM004 for my saftey from beating. Beaten on 1. 4-27-97, 2. 2-7-97, 3. 3-23-97, 4. 6-23-97 E Blk Before I'm killed by my defendants.

Your grievance has been received and will be processed in accordance with DC-ADM 804.

/s/ Sharon M. Banks — 6/25/97
Signature of Grievance Coordinator — Date

POLICY STATEMENT
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

Policy Subject:
Consolidated Inmate Grievance Review System

Policy Number:
DC-ADM 804

Date of Issue:	Authority:	Effective Date:
July 20, 1994	Joseph D. Lehman Commissioner	October 20, 1994

I. AUTHORITY

The Authority of the Commissioner of Corrections to direct the operation of the Department of Corrections is established by Sections 201, 206, 506 and 901-B of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, as amended.

II. PURPOSE

It is the purpose of this Administrative Directive to establish policy regarding the Consolidated Inmate Grievance Review System and to ensure that inmates have an avenue through which resolution of specific problems can be sought.

This directive sets forth procedures for the review of Inmate Grievances not already covered by other Administrative Directives and policies. It also provides the method through which review procedures established by other directives are to be integrated with the procedures outlined in this directive.

III. APPLICABILITY

This policy is applicable to all employees of the Department of Corrections and all inmates under

the jurisdiction of the Department of Corrections and to those individuals and groups who have business with or use the resources of the Department of Corrections.

IV. DEFINITIONS

A. Grievance –

The formal written expression of a complaint submitted by an inmate related to a problem encountered during the course of his/her confinement.

B. Grievance Coordinator –

The Corrections Superintendent's Assistant in an institution or the Assistant to the Regional Director in Community Corrections who is responsible for the overall administration of the Inmate Grievance System in that facility/region. This includes all data collection, tracking and statistical reporting. At the direction of the Facility Manager or Community Corrections Regional Director, the Grievance Coordinator may be called upon to provide Initial Review of certain grievances.

C. Grievance Officer –

An appropriate Department Head or Management Level staff person designated by the Facility Manager or CC Regional Director to provide Initial Review of an inmate grievance arising from his/her specific area of responsibility, e.g., a Unit Manager would be assigned to provide Initial Review of a grievance from the housing unit. If the grievance arises from the Food Services Area, the Grievance Officer designated by the Facility Manager shall be the Food Services Manager,

likewise, the Corrections Health Care Administrator would be the Grievance Officer for a grievance related to a Health Care issue.

D. Central Office Review Committee (CORC) –

A committee of at least three (3) Central Office staff appointed by the Commissioner of Corrections to include the Commissioner, Executive Deputy Commissioner and Chief Counsel or their designees.

With the exception of appeals from disciplinary action under DC-ADM 801 and appeals arising from Health Care or medical treatment grievances, the CORC shall have responsibility for direct review of all Inmate Appeals for Final Review.

E. Central Office Medical Review Committee (COMRC) –

A Committee appointed by the Commissioner to include the Director of the Bureau of Health Services and relevant Bureau staff. The COMRC shall have responsibility for direct review of grievance appeals related to Health Care and medical treatment issues.

F. Initial Review –

The first step in the formal Inmate Grievance Process for all issues except those already governed by other specified procedures (see VI E). All reviews conducted below the level of Facility Manager or Regional Director are considered initial reviews.

G. Appeal from Initial Review –

The first level of appeal of a decision rendered at Initial Review. This appeal is directed to the

Facility Manager or Community Corrections Regional Director.

An appeal of the Initial Review decision on a grievance related to a Health Care or Medical issue shall be submitted directly to the COMRC at Central Office.

Only issues raised at Initial Review shall be appealed.

H. Final Review –

Upon completion of Initial Review and appeal from Initial Review, an inmate may seek Final Review from the Central Office Review Committee (CORC), for any issue involving continued non-compliance with Department of Corrections directives or policy, the ICU Consent Decree or other law.

V. POLICY

A. It is the policy of the Pennsylvania Department of Corrections that every individual committed to its custody shall have access to a formal procedure – the Consolidated Inmate Grievance Review System – through which the resolution of problems or other issues of concern arising during the course of confinement may be sought. For every such issue there shall be a forum for review and an avenue of appeal, but only one.

B. Informal Resolution of Problems – All inmates are expected to attempt to resolve problems or differences with staff on an informal basis through direct contact or by sending a request slip to appropriate staff. Action taken by the inmate to resolve the situation must be indicated on the grievance form, Section B.

The Grievance Form, DC 804, Part I, is available in each Housing Unit or upon request from Unit staff. This is the proper form to be used for submission of a grievance and it should be completed according to the directions provided.

It is required that a genuine effort be made to resolve the problem before the grievance system is used. The inmate must document these efforts in Section B of the Grievance Form. Failure to do so may result in the grievance being returned to the inmate without action. The inmate may then refile the grievance with Section B properly completed.

C. Any inmate using the grievance system shall do so in good faith and for good cause.

No one shall be punished, retaliated against or otherwise harmed for good faith use of this grievance system.

Deliberate misuse of the grievance system may result in restricted access or disciplinary action, at the discretion of the Facility Manager.

D. It is the intent of the Department of Corrections to provide for an accelerated review of appeals of grievances related to medical issues. For this reason, the inmate is permitted to appeal a medical grievance to the Central Office Medical Review Committee for Final Review directly from Initial Review. See VI., C.1.

E. The Inmate Grievance Review System is intended to deal with a wide range of issues, procedures or events which may be of concern to inmates. It is not meant to address incidents

of an urgent or emergency nature. When faced with such an event, the inmate should contact the nearest staff member for immediate assistance.

VI. PROCEDURES

A. A Grievance shall be submitted to the Grievance Coordinator in the following manner.

1. All grievances shall be in writing and in the format provided on the forms supplied by the institution (DC 804 Part 1). See Section V., B.

2. All grievances shall be presented individually. Any grievance submitted by a group of inmates will not be processed, however, if the Grievance Coordinator believes that the issue being grieved is legitimate, it will be referred to appropriate Management Staff for review.

3. Only an inmate who has been personally affected by a Department or institution action or policy shall be permitted to seek review of a grievance or appeal. The inmate grievant must sign the grievance or appeal.

4. All grievances and appeals must be presented in good faith. They shall include a brief statement of the facts relevant to the claim. The text of the grievance must be legible and presented in a courteous manner. The inmate should identify any persons who may have information which could be helpful in resolving the grievance. The inmate may also specifically state any claims he/she wishes to make concerning

violations of Department directives, regulations, the ICU Consent Decree or other law. The inmate may request to be personally interviewed prior to the decision on Initial Review. Any inmate who submits a grievance containing false and malicious information may be subject to disciplinary action.

5. Grievances and appeals based on different events should be presented separately, unless it is necessary to combine the issues to support the claim. The Grievance Officer may combine multiple grievances which relate to the same subject.

   NOTE: At any point in the grievance process, the inmate has the right to withdraw the grievance.

B. Initial Review

1. Initial Review Procedures must be completed before Appeal from Initial Review or Final Appeal may be sought. Any claims of violation of the ICU Consent Decree must be raised through this grievance procedure before they may be addressed by any court.

2. Grievances must be submitted for initial review to the Facility/Regional Grievance Coordinator within fifteen (15) days after the events upon which the claims are based. Extensions of this time period may be granted by the Facility Manager/ Regional Director for good cause.

3. The Grievance Coordinator will forward the grievance to the appropriate Grievance Officer for investigation and resolution.

The inmate grievant and other persons having personal knowledge of the subject matter may be interviewed. A grievant who has requested a personal interview, shall be interviewed.

4. Within ten (10) working days of receipt of the grievance by the Grievance Officer, the grievant shall be provided a written response to the grievance to include a brief rationale, summarizing the conclusions and any action taken or recommended to resolve the issues raised in the grievance.

   The Grievance Coordinator may authorize an extension of up to an additional ten (10) working days if the investigation of the grievance is pending. If an extension is necessary, the grievant shall be so advised in writing.

C. Appeal from Initial Review

1. An Initial Review Decision of a grievance on a Health Care or medical treatment issue may be appealed directly to the Central Office Medical Review Committee for Final Review within five (5) days of receipt by the inmate of the Initial Review decision. A grievance for which the Corrections Health Care Administrator conducted the Initial Review will usually be considered a Medical Grievance.

   All other appeals will be submitted as follows.

2. An inmate may appeal an initial review decision to the Facility Manager or Community Corrections Regional Director in writing, within five (5) days from the date

of receipt by the inmate of the Initial Review decision. The inmate must appeal in this manner prior to seeking Final Review. Only issues which were raised for initial review may be appealed.

3. All appeals must conform to the requirements specified in Section VI A of this directive. The appeal must clearly identify the decision appealed from and all reasons for appeal. Only one appeal from any initial review decision will be permitted.

4. The Facility Manager or Regional Director must notify the inmate of his/her decision within ten (10) working days after receiving the appeal. This decision may consist of approval, disapproval, modification, reversal, remand or reassignment for further fact finding, and must include a brief statement of the reasons for the decision.

D. Final Review

1. Any inmate who is dissatisfied with the disposition of an Appeal from Initial Review decision may, within seven (7) days of receiving the decision, appeal any issue related to non-compliance with the ICU Consent Decree, other law, Department directive or policy, for final review. Only issues raised at the Initial Review and Appeal level may be referred for Final Review.

2. Final Review will not be permitted until the inmate has complied with all procedures established for Initial Review and Appeal from Initial Review. Exceptions may be made for good cause.

3. Final Review of all appeals will be sent directly to the CORC except the following:

   a. Medical Grievances which will be reviewed by COMRC.

   b. Requests for Final Review of appeals from disciplinary actions which were processed through DC-ADM 801. These will be reviewed by the Office of the Chief Counsel which may respond directly to the inmate or refer the appeal to the Central Office Review Committee (CORC) for further reviews.

The address of the CORC/COMRC is:

PA Department of Corrections
Central Office Review Committee
PO Box 598/2520 Lisburn Road
Camp Hill, PA 17001-0598

4. Request for Final Review must clearly identify the decision appealed from and all reasons for appeal. Only one appeal from any second level (Appeal from Initial Review) decision will be permitted.

5. The CORC/COMRC, or any member thereof, may require additional investigation to be made prior to a decision on a Final Review appeal.

6. The CORC/COMRC will review all issues properly raised according to the above procedures. It may also review and consider any other related matter.

7. For all Appeals receiving Final Review, the CORC/COMRC will issue its decision

within twenty-one (21) days after receipt of an appeal. The decision may consist of approval, disapproval, modification, reversal, remand or reassignment for further fact finding, and must include a brief statement of the reasons for the decision. The committee shall notify the grievant and Facility Manager/Regional Director of its decision and rationale.

8. The Chief Counsel will notify counsel for the ICU class of disposition by the CORC/COMRC of any matter raised on Final Review alleging a violation of the ICU Consent Decree.

E. Exceptions

Initial Review and Appeal from Initial Review of issues related to the following Administrative Directives shall be in accordance with procedures outlined therein, and will not be reviewed by the Grievance Officer or Grievance Coordinator.

1. DC ADM 805 – Policy & Procedures for Obtaining Pre-Release Transfer.

2. DC ADM 801 – Inmate Disciplinary and Restricted Housing Unit Procedures. See DC-ADM 801 VI., G & I

3. DC ADM 802 – Administrative Custody Procedures. See DC-ADM 802, VI, B, 1,2. Appeal from Initial Review, see DC-ADM 802, VI, B, 4, a.

4. DC-ADM 814 – Incoming Publications

See 814-IIIB, Appeal from Initial Review, see 814-IIID

Additionally, there may be other kinds of issues for which Initial Review Procedures have been previously established by Administrative Memorandum or Policy Statement.

F. Admissions and Review

1. All proceedings pursuant to this directive are in the nature of settlement negotiations and will, therefore, be inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee. No resolution of any grievance offered as a result of this procedure shall be admissible before any court or other tribunal as an admission of violation of the ICU Consent Decree or any State or federal law.

2. No decision rendered as a result of the processing of a grievance shall be reviewable by any court unless it establishes a system or institution-wide violation of the decree.

G. Completion of Review After Transfer

Any inmate who is transferred after the filing of a grievance or appeal, but prior to the completion of the appeal process, may continue to pursue the grievance or appeal by notifying the Facility Manager or Regional Director of the facility in which confined when the grievance was filed. Adjustments in the various time limitations may be made to facilitate review.

VII. SUSPENSION DURING EMERGENCY

In an emergency situation or extended disruption of normal institutional operation, any provision or

section of this policy may be suspended by the Commissioner or his/her designee for a specific period of time.

VIII. RIGHTS UNDER THIS POLICY

This policy does not create rights in any person nor should it be interpreted or applied in such a manner as to abridge the rights of any individual. This policy should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the accomplishment of the purpose of the policies of the Department of Corrections.

IX. SUPERSEDED POLICY AND CROSS-REFERENCE

This directive revises the Inmate Grievance System (DC-ADM 804, May 1, 1984), and supersedes the pilot grievance system in effect at selected DOC institutions. It does not supersede or repeal any portion of any other directive or policy statement. Where this directive is inconsistent with any other directive or policy, both shall be interpreted so as to provide full review of all issues raised, consistent with the scope and purpose of this directive. Conflicts will most frequently occur at the Initial Review level, where other directives establish committees to review specific issues.

Cross References: DC-ADM 801, DC-ADM 802
ACA Cross References: 3-4271

cc:
Executive Deputy Commissioner Reid
Deputy Commissioner Clymer
Deputy Commissioner Fulcomer
Acting Deputy Commissioner Beard
All Superintendents
CCC Directors (4)
File

/Joseph D. Lehman/
Joseph D. Lehman,
Commissioner

BULLETIN
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

To: Superintendents
Boot Camp Commander
Regional Directors
Executive Staff

Policy Subject:
DC-ADM 804
Consolidated Inmate Grievance Review System
Policy Number: DC-ADM 804-1
Policy Issue Date: July 20, 1994

Date of Issue:	Authority:	Effective Date:
April 2, 1996	/Martin Horn/	May 20, 1996

The purpose of this Bulletin is to include medical grievances in the regular grievance process and to discontinue the Central Office Medical Review Committee (COMRC).

It is important that the Superintendent be aware of all functions within the institution. Similarly, it is essential that the Bureau of Health Care Services be included in the CORC process, to include review by the Chief Counsel's office with respect to medical grievances. Therefore, all grievances, including those relating to medical issues, are to be processed in the same manner. The grievance coordinator will continue to forward medical grievances to the CHCA for initial review. Then, the Superintendent will be responsible for the Appeal from Initial Review, as for all other grievances.

Final Appeal of medical grievances will no longer be forwarded to the COMRC. The Central Office Review Committee (CORC) will process the appeals. The Director

of the Bureau of Health Care Services, or designee, will participate as a member of CORC for all medical grievance appeals.

The following sections of DC-ADM 804 are to be discontinued:

IV.E.: Definition of COMRC

IV.G.: "An appeal of the Initial Review decision on a grievance related to a Health Care or Medical issue shall be submitted directly to the COMRC at Central Office.

V.D.: "It is the intent of the Department of Corrections to provide for an accelerated review of appeals of grievances related to medical issues. For this reason, the inmate is permitted to appeal a medical grievance to the Central Office Medical Review Committee for Final Review directly from Initial Review."

BULLETIN
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

To: Executive Staff
Superintendents
Regional Directors

Policy Subject:
Consolidated Inmate Grievance Review System
Policy Number: DC-ADM 804-2
Policy Issue Date: July 20, 1994

Date of Issue:	Authority:	Effective Date:
October 1, 1997	/Martin Horn/	November 1, 1997

The procedures for appeal to final review under DC-ADM 804, VI, D, 5-7, are amended as follows:

(1) The Chief Hearing Examiner will replace the Central Office Review Committee (CORC) at final review of all grievance appeals. The Chief Hearing Examiner will perform all functions previously performed by CORC.

(2) In reviewing grievances submitted for final review, the Chief Hearing Examiner will review the initial grievance and response, any appeals therefrom and the responses thereto and the issues appealed to final review.

(3) The Chief Hearing Examiner will review health care related grievances with the Bureau of Health Care. Appeals raising legitimate legal issues, including but not limited to access to courts and sentencing issues, will be reviewed with an attorney prior to response.

(4) Upon completion of final review, the Chief Hearing Examiner will respond directly to the inmate in all

cases where the position taken by the institution is upheld.

(5) In all cases where the action of the Grievance Coordinator, PRC, Incoming Publication Review Committee, or Superintendent is reversed or amended, or where a matter is remanded, the Chief Hearing Examiner will prepare a letter to the inmate and a memorandum to the Superintendent. The Chief Hearing Examiner will forward the letter and memorandum to the appropriate Regional Deputy Commissioner for review and signature.

(6) The Chief Hearing Examiner will be responsible for assuring that:

(a) appeals to final review are responded to in a timely fashion;

(b) records pertaining to such appeals are maintained properly; and

(c) counsel for the ICU class is notified of the disposition at final review of any matter raised to final review alleging a violation of the ICU vs Shapp Consent Decree.

It is the intent of the Department of Corrections to provide inmates with a complete and timely review of all appeals properly raised to final review. These amendments have been established to ensure timeliness at final review while continuing to provide a thorough, impartial review of the issues.

BULLETIN
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

To: Executive Staff
Superintendents
Regional Directors
Boot Camp Commander

Policy Subject:
Consolidated Inmate Grievance Review System
Policy Number: DC-ADM 804-3
Policy Issue Date: July 20, 1994

Date of Issue:	Authority:	Effective Date:
October 21, 1997	/Martin Horn/	November 1, 1997

The purpose of this bulletin is to facilitate timely responses from the Chief Hearing Examiner's Office to all appeals to final review.

(1) All appeals to final review should be addressed to the Chief Hearing Examiner,

Chief Hearing Examiner
1451 S. Market Street
Elizabethtown, PA 17022

Appeals which are addressed to the Commissioner, Chief Counsel, to other Central Office staff, are of course, delivered to these individuals first, then have to be referred to the Chief Hearing Examiner. Improperly addressed appeals may cause a delay in the response to final appeal.

(2) Inmates appealing to final review are responsible for providing the reviewing body with any available paperwork relevant to the appeal. A proper appeal to final

review should include photocopies of the initial grievance, initial grievance response, and the Superintendent's response. Appeals without proper records will be reviewed, but the review will be delayed until the appropriate paperwork can be obtained.

BULLETIN
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

To: Executive Staff
Superintendents
CCCRegional Directors
Boot Camp Commander

Policy Subject:
Consolidated Inmate Grievance Review System
Policy Number: DC-ADM 804-4
Policy Issue Date: July 20, 1994

Date of Issue:	Authority:	Effective Date:
April 29, 1998	/Martin Horn/	May 1, 1998

The purpose of this bulletin is to amend the section VI. Procedures, A.4. to read,

"All grievances and appeals must be presented in good faith. They shall include a brief statement of the facts relevant to the claim. The text must be legible and presented in a courteous manner. The Grievant should identify any persons who may have information which could be helpful in resolving the grievance. The Grievant may specifically raise any claims concerning violations of Department of Corrections directives, regulations, court orders, or other law. The Grievant may also include a request for compensation or other legal relief normally available from a court. The inmate may request to be personally interviewed at initial review. Any inmate who submits a grievance containing false information may be subject to disciplinary action. Inmates who have not already completed final review may request compensation or legal relief on appeal to final review."

And to amend Section VI. Procedures, B. Initial Review, 2. To read:

"Grievances must be submitted for initial review to the Facility/Regional Grievance Coordinator within fifteen (15) days after the events upon which the claims are based. Extensions of this time period may be granted by the Facility Manager/Regional Director for good cause. Such extensions will normally be granted if the events complained of would state a claim of violation of federal right.

FEB 21 2000

(12)

SUPREME COURT, U.S.
FILED
FEB 21 2001
CLERK

No. 99-1964

In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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DESIGNATION OF CORPORATE RELATIONSHIPS

There are no corporate parties, and, accordingly, no designation of corporate relationships pursuant to Supreme Court Rule 29.6 is required.

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SUMMARY OF ARGUMENT

This case presents a single question: whether, in requiring prisoners to exhaust "such administrative remedies as are available," Congress intended to require a prisoner to exhaust an administrative remedy that does not permit the recovery of monetary damages, where the prisoner alleges that he was beaten by prison guards and seeks monetary damages to remedy his injuries. In his opening brief, petitioner Timothy Booth showed that the plain language of 42 U.S.C. § 1997e(a), the administrative law principles against which Congress adopted that language, and the statutory history of prisoner exhaustion requirements all lead to the same conclusion – that § 1997e(a) does not require a prisoner who seeks only monetary damages to remedy a past constitutional violation to exhaust administrative remedies where monetary damages are not available under the prison's grievance procedure.[1]

In response, respondents exert considerable effort arguing that § 1997e(a) is an unqualified mandatory exhaustion statute, that there is no futility exception to such a statute, and, accordingly, that courts have no discretion to excuse a prisoner's failure to exhaust administrative remedies. But Mr. Booth's argument is not based on a futility exception. Rather, his argument is based on

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[1] Both the United States and 50 states and territories filed briefs *amicus curiae* in support of respondents. Many of the arguments in the *amici* briefs mirror those in respondents' brief. For simplicity, we refer to "respondents" when we address arguments that respondents make either alone or along with an *amicus*, and to the particular *amicus* when we address arguments that the particular *amicus* makes alone. We cite the Brief for the United States as *Amicus Curiae* Supporting Respondents as "United States Am. Br." and the Brief of 50 States and Territories as *Amicus Curiae* in Support of the Respondents as "States Am. Br."

the plain language of § 1997e(a) – that an administrative procedure that cannot give the relief sought is not a "remed[y]" that is "available," and so, under the express language of § 1997e(a) (not under any judicially-created exception), no exhaustion is required. While respondents may have preferred Congress to have enacted an unqualified exhaustion statute, it did not do so.

When they turn to the express language of § 1997e(a), respondents essentially concede, as they must, that the phrase "such administrative remedies as are available" imposes some limitation on what must be exhausted. But respondents view that limitation as meaning that the grievance procedure only must address the general subject matter of the prisoner's complaint for exhaustion to be required, without regard to whether the procedure can remedy the wrong or provide relief. Not only is respondents' interpretation of the statutory language strained, but in their concession that § 1997e(a) is not unqualified, respondents call into question their policy-based arguments about the importance of a "bright-line" rule to the purposes of the Prison Litigation Reform Act ("PLRA") and to prison administration.

Having conceded that § 1997e(a) does not require that all prison complaints first be exhausted, respondents rely almost exclusively on Congress's deletion of the word "effective" from the prior version of the statute to support their argument that an administrative procedure that cannot provide the relief sought is nonetheless an "available remedy" that must be exhausted. But the meaning that respondents place on the word "effective" is belied by the terms of the prior statute itself. Moreover, the support that respondents offer for that meaning (a Department of Justice regulation and *dicta* from this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992)) does not bear the considerable weight that respondents would place upon it.

Finally, respondents assert that a broad exhaustion rule best serves the purposes of the PLRA. However, in addition to having already cast doubt on this argument through their concession that § 1997e(a) does not (indeed, cannot) require exhaustion in every case, respondents greatly overstate the practical benefits of exhaustion of prison grievance procedures in the present circumstances and understate the practical costs.[2]

ARGUMENT

I. MR. BOOTH'S ARGUMENT RELIES ON THE PLAIN LANGUAGE OF 42 U.S.C. § 1997e(a) AND NOT ON A PURPORTED EXCEPTION TO THE STATUTE.

Respondents exert considerable effort arguing that, "where Congress has specifically required exhaustion, the courts may not interpose a 'futility' exception." Resp't Br., at 33. *See also id.* at 33-40; United States Am. Br., at 16-17. Respondents are refuting an argument that Mr. Booth has not made.

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[2] As the United States points out in its *amicus* brief, *see* United States Am. Br., at 10, Mr. Booth's complaint included claims for both monetary and other relief. However, the district court could have dismissed his non-monetary claims for failure to exhaust and allowed him to proceed with his monetary damages claims. *See, e.g., Miller v. Menghini*, 213 F.3d 1244, 1246 (10th Cir. 2000). This is, in effect, the result that occurred when Mr. Booth was transferred out of Smithfield prison, thereby mooting his claims for non-monetary relief. *Cf. Mathews v. Diaz*, 426 U.S. 67, 75 (1976) (holding that 42 U.S.C. § 405(g)'s jurisdictional requirement of filing a benefits application with the relevant administrative agency could be satisfied after filing of the complaint or even when the case was on appeal).

It is axiomatic that "exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute," *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989), and that the courts may not create an exception to a statutory exhaustion requirement "where Congress has declined to do so," *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989). Mr. Booth does not take issue with these obvious propositions. The fallacy in respondents' argument is that it presupposes the answer to the central question in this case: whether, by requiring prisoners to exhaust only "such administrative remedies as are available," Congress has mandated the exhaustion of prison grievance procedures that cannot provide the relief sought by a prisoner.

Respondents argue that Mr. Booth's plain language argument misapprehends the relevant case law, Resp't Br., at 33-40; *see also* United States Am. Br., at 16-17, but it is respondents who miss the point. Mr. Booth cited numerous cases involving administrative exhaustion, some based on explicit statutory commands (*see, e.g., Bowen v. City of New York*, 476 U.S. 467 (1986); *Weinberger v. Salfi*, 422 U.S. 749 (1975)); others based on implicit exhaustion requirements (*see, e.g., Reiter v. Cooper*, 507 U.S. 258 (1993)); and yet others without a statutory basis at all (*see, e.g., Clayton v. International Union, UAW*, 451 U.S. 679 (1981); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963)). *See* Pet'r Br., at 23-27.

But the existence of a statutory scheme in those cases is beside the point: Mr. Booth relies on these cases to show that, when Congress chose to limit the exhaustion requirement to "such administrative remedies as are available," rather than to create an unqualified exhaustion requirement, it did so against the backdrop of these administrative exhaustion decisions, both statutory and otherwise, including the general rule in § 1983 actions that exhaustion is not required absent a specific statutory

requirement. *See Patsy v. Board of Regents*, 457 U.S. 496 (1982). *See* Pet'r Br., at 23-24. Indeed, in adopting this language in 1980, and in preserving it when it amended the statute in 1996, there is no indication that Congress "decisively rejected the traditional approach" to exhaustion. United States Am. Br., at 16. To the contrary, Congress wrote and maintained the language "such administrative remedies as are available," signaling its rejection of the unconditional rule that respondents would have preferred.

Indeed, as well illustrated by the very cases upon which respondents rely, *see* Resp't Br., at 38-39, Congress just as easily could have enacted an unequivocal, unqualified statutory exhaustion requirement – without the limitation "such administrative remedies as are available." *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 756 (1975) ("No action . . . shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." (alterations in original)); *Hallstrom v. Tillamook County*, 493 U.S. 20, 25-26 (1989) ("[n]o action may be commenced under [the citizen suit provision of RCRA] prior to sixty days after the plaintiff has given notice of the violation" to the federal and state governments and the alleged violator of RCRA); *McNeil v. United States*, 508 U.S. 106, 107 n.1 (1993) ("An action shall not be instituted [under the FTCA] . . . unless the claimant shall have first presented the claim to the appropriate Federal agency. . . .").

While respondents argue that the language of the statutes at issue in these cases is "similar" to the language of § 1997e(a), Resp't Br., at 38, in fact the opposite is true: not one of those statutes contained any limiting language in the way that § 1997e(a) does. Had Congress intended to enact a "similar" unqualified statute, it would have drafted § 1997e(a) like the statutes at issue in *Weinberger*, *Hallstrom*, and *McNeil*, to read, "No action shall be brought . . . until administrative procedures are

exhausted." Thus, what respondents' cases illustrate is that when Congress wants to adopt an unqualified exhaustion rule, it is quite capable of doing so, yet it did not do so here. In this fundamental respect, respondents' cases actually support Mr. Booth's argument, not their own.[3]

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[3] The other case upon which respondents rely, *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), also is distinguishable. Respondents cite *Shalala* for this Court's rejection of the argument that a plaintiff could avoid a required administrative procedure simply because the relevant agency "might not provide a hearing for [a] *particular contention*" of the plaintiff's. *Id.* at 23 (emphasis in original). Yet, Mr. Booth does not argue that he need not exhaust administrative remedies because the prison authorities will ignore one of the arguments in support of his claim. Rather, the prison grievance system cannot address his claim *at all*, because he seeks a specific remedy – monetary damages to remedy a past, completed constitutional violation – that is unavailable through that process.

In addition, respondents' quotation from *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), obscures the substantial differences between that case and this one. While the Court did indicate that administrative exhaustion generally is required even though a party challenges an administrative body's subject-matter jurisdiction over the dispute, *see id.* at 50-51, the party challenging the administrative body's power in *Myers* was not the aggrieved party, but the defendant. In *Myers*, the party seeking relief and the administrative body agreed that the administrative body had the power to issue the relief sought, but the respondent in the administrative action sought an injunction to prevent the administrative body from holding a hearing on the matter. *See id.* at 43. In contrast, here, Mr. Booth does not seek to enjoin any ongoing administrative proceedings brought against him, and, significantly, both he and the Pennsylvania Department of Corrections agree that the prison grievance system could *not* have provided him with the remedy he sought.

II. RESPONDENTS' READING OF § 1997e(a) IS STRAINED AND INCONSISTENT WITH THE VERY PURPOSES OF THE POLICIES THAT RESPONDENTS ADVANCE.

Notwithstanding their mischaracterization of § 1997e(a) as establishing a "broad rule . . . requiring exhaustion in all cases," Resp't Br., at 12; *see also* United States Am. Br., at 13 ("broad and categorical exhaustion requirement"), and their criticism of Mr. Booth for reading an "exception" into the statute, Resp't Br., at 33-40; United States Am. Br., at 16-17, 23, when respondents actually address the phrase "such administrative remedies as are available," they concede that it does not, in fact, "requir[e] exhaustion in all cases." But in respondents' view, the meaning of that phrase, and the limit on what must be exhausted, is simply that the grievance procedure must "address the subject matter of [the prisoner's] complaint." Resp't Br., at 20; *see also id.* at 10 ("address [the prisoner's] complaint"); United States Am. Br., at 11 ("address the kind of problem identified by the inmate's complaint"); States Am. Br., at 7 ("addresses the problem that a prisoner raises"). Respondents' interpretation of the pivotal phrase not only is less natural and more strained than Mr. Booth's, but it is less workable and in sharp conflict with respondents' own policy-based arguments.

Significantly, the statute does not use the words "address" or "subject matter," but it does use the words "remedy" and "available," words that focus specifically on what benefits will accrue to the complaining party. As the United States itself acknowledges, "[t]he term 'remedy' means 'the legal means to recover a right or to prevent or obtain redress for a wrong,' and 'available' means 'capable of use for the accomplishment of a purpose.' " United States Am. Br., at 11 (quoting *Webster's Third New International Dictionary* 1920, 150 (1993)). Respondents offer no basis for

ignoring the plain meaning of the terms Congress chose to use or for grafting the terms "address" or "subject matter" onto the statute. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 121 S. Ct. 513, 519 (2000) ("Because the [statute] does not define 'a final decision with respect to an arbitration' or otherwise suggest that the ordinary meaning of 'final decision' should not apply, we accord the term its well-established meaning.").

Moreover, respondents' interpretation of the statute is inconsistent with their urging that "the across-the-board exhaustion mandated by Congress provides a bright-line rule that benefits courts, prisoners and prisons alike." Resp't Br., at 31. Once respondents concede that § 1997e(a) is not, in fact, an "across-the-board," "bright-line" rule, many of their policy-based arguments likewise fall by the wayside.

For example, while respondents assert that Mr. Booth's plain reading is contrary to Congress's intent to eliminate the case-by-case review that district courts engaged in under the former statute, *see* Resp't Br., at 26, their own reading of the statute also would require district courts to undertake a fact-intensive and time-consuming review of prisoner pleadings. Under Mr. Booth's reading, the court must inquire whether the remedy sought by the prisoner, such as monetary damages, is available through the administrative process. This rule is simple and bright-line: if the remedy is available, exhaustion is required; if it is not available, exhaustion is not required (because the statute does not command it). In contrast, under respondents' reading, rather than looking simply at the prisoner's request for relief, the court must parse the "subject matter of his complaint," a task surely more burdensome, especially for *pro se* prisoner complaints, than identifying the relief that the prisoner seeks. *See* Resp't Br., at 30 (discussing the "difficulties which face courts in dealing with prisoner complaints").

Related to respondents' contention that "available remedy" means "capable of addressing the subject matter" of the prisoner's complaint is respondents' refrain that the federal court should ignore prisoners' assertion of "the relief they prefer," Resp't Br., at 21, as this simply represents "the subjective desires of individual prisoners," or "what's in it for me?" States Am. Br., at 4, 8. *See also* United States Am. Br., at 7 ("the relief that the inmate would like").[4] Respondents' view that somehow a prisoner's assertion of a specific claim for specific relief to which s/he is legally entitled should be accorded less (or even no) weight than any other litigant's is unfounded.

Indeed, the assertion that a prisoner's "subjective" desire for particular relief should not determine whether a "remedy" is "available" is entirely inconsistent with the longstanding rule that a plaintiff is the master of his or her complaint. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). It also is inconsistent with § 1983, which, of course, provides for a damages remedy. *See City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future."). Moreover, what relief will be available in any given case is, in any event, dictated by the facts of the case, not by

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[4] The States as *amici* go even further, essentially asserting that the purpose of prisoner complaints is to improve prison conditions generally, not to provide redress for the particular wrong suffered by the prisoner. *See, e.g.*, States Am. Br., at 7 ("[A] remedy is available if it addresses the problem that a prisoner raises. It may not address it to his full satisfaction, or not to his satisfaction at all. In the unique context of prisons, however, a situation may be 'addressed' in the broader sense . . . even if it admittedly gives little solace to the grieving inmate."). The States' view that prisoners should, in effect, serve as emissaries of prison reform and that their "own particular pecuniary interests" should be ignored, *id.* at 8, is unprecedented.

the plaintiff's preferences. To suggest, then, that a prisoner's request for monetary relief (the only remedy available for a completed harm) is somehow manufactured or selfish and so should be disregarded has no support in law or logic, let alone in the language of the statute.

III. THE TERM "PLAIN, SPEEDY, AND EFFECTIVE" IN THE FORMER § 1997e(a) ADDRESSED THE PROCEDURAL FAIRNESS AND EFFICACY OF GRIEVANCE PROCEDURES, NOT WHETHER THE PROCEDURES COULD GRANT THE SUBSTANTIVE RELIEF SOUGHT.

To support their contention that a remedy is available even if it cannot redress the wrong or provide the relief sought, respondents place principal reliance on Congress's deletion of the word "effective" in the 1996 amendments to § 1997e(a). While Mr. Booth acknowledges that Congress expanded and significantly changed the exhaustion requirement through its amendments to § 1997e(a), he does not agree that Congress's deletion of the word "effective" undermines his argument. To the contrary, what the amended version of the statute left intact was the requirement that the "remedy" be "available" before exhaustion would be required. Where, as here, the remedy is not available, the prisoner need not exhaust.

The prior version of § 1997e gave district courts the discretion to continue state prisoner actions under § 1983 for a limited period of time in cases in which either the United States Attorney General had certified that the prison grievance procedure met minimum acceptable standards in providing "plain, speedy, and effective administrative remedies," or the district court found that the administrative remedies were "otherwise fair and effective." Even then, exhaustion was required only if a court determined that exhaustion would be "appropriate

and in the interests of justice." The 1996 amendments to § 1997e expanded the statute to include federal prisoners; deleted the Attorney General certification process; removed the district court's discretion to require exhaustion only if the grievance system was certified as "plain, speedy, and effective" or was "otherwise fair and effective"; and eliminated the district court's further discretion to require exhaustion as "appropriate and in the interests of justice."

The import of the deletion of the word "effective" must be judged in light of these major changes and the function the word "effective" served under the prior law. As Mr. Booth demonstrated in his opening brief, the term "plain, speedy, and effective" in the prior version of § 1997e was related to the procedural aspects of the grievance procedure at issue, and did not, as respondents contend, concern the substantive issue of whether the grievance procedure could remedy a wrong or grant appropriate relief. Rather, the term "such administrative remedies as are available" – which Congress retained when it amended the statute – addressed this substantive issue. As set forth in more detail in petitioner's opening brief, this is made clear from a review of the minimum standards in former § 1997e(b)(2) that a grievance procedure was required to meet before it could be deemed to be "plain, speedy, and effective," all of which involved procedural matters, and none of which related to whether, in fact, the grievance system could grant the relief sought. *See* Pet'r Br., at 35-39 & n.14.

Despite the clear statutory scheme tying the word "effective" to procedural, not substantive, matters, respondents insist that when Congress eliminated the word "effective," it meant to eliminate the substantive inquiry of whether the procedure could provide the relief sought. *See* Resp't Br., at 18-21; United States Am. Br., at 14-15. As support, respondents point to (1) the regulations promulgated by the Department of Justice under

§ 1997e(b),[5] and (2) *dicta* from this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), which involved § 1997e only by analogy. Neither supports respondents' argument.

The Department of Justice, charged under the 1980 version of § 1997e(b) with the task of establishing standards for the "implementation of a plain, speedy, and effective system for the resolution of grievances" in prisons, promulgated regulations that dealt primarily with the procedural aspects of administrative grievance systems. *See* 28 C.F.R. pt. 40 (2000). Respondents focus on one of these, 28 C.F.R. § 40.6, to support their argument that an "effective" remedy under the former § 1997e(a) was "one that provided for money damages." Resp't Br., at 20. Section 40.6 provided that "[t]he grievance procedure shall afford a successful grievant a meaningful remedy. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary." 28 C.F.R. § 40.6. Respondents also cite the Attorney General's commentary in promulgating the regulations that, "although monetary relief is desirable, it is not an essential component of a fair and effective grievance procedure." Resp't Br., at 15 n.14 (quoting 46 Fed. Reg. 3843, 3845 (Jan. 16, 1981)).

Contrary to respondents' assertion, the language in this regulation and commentary support petitioner's reading of the statute at least as much as it supports respondents'. Under § 40.6, while certain "remedies" might be "available" through the prison grievance procedure, the procedure still might not be effective (because it might not provide "a reasonable range of meaningful remedies"). Moreover, the commentary separates out the

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[5] Significantly, the United States does not advance the argument pressed by respondents with respect to the Department of Justice regulations.

availability of "monetary relief" (indicating it was "desirable," but not "essential") from an "effective grievance procedure." These provisions thus suggest that the Attorney General considered that a grievance procedure without money damages still could be "fair and effective," and, conversely, that a grievance procedure with a range of available remedies (including, presumably, money damages) might not meet the requirements of an effective procedure. In short, even under the regulation upon which respondents rely, the *availability* of money damages was not tied to the *effectiveness* of a grievance procedure, and Congress's elimination of the "plain, speedy, and effective" requirement left untouched the prerequisite – in the former statute *and* the current one – that a remedy be "available" before exhaustion is required.

In addition to relying on the Department of Justice's regulation, respondents focus on *dicta* from this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). Specifically, respondents cite one sentence in *McCarthy*, in which the Court noted that, "in contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, [§ 1997e] conditions exhaustion on the existence of 'effective administrative remedies.' " *Id.* at 150. From this sole reference, respondents make a giant leap and conclude that the word "effective" in the prior statute "implied provision for money damages, at least where money damages was the only relief a prisoner sought." Resp't Br., at 17. *See also* United States Am. Br., at 13-15.

Of course, as respondents acknowledge, *see* Resp't Br., at 17, the discussion in *McCarthy* of the term "effective" was *dicta*. In fact, the meaning of the term "effective" in the prior statute was not mentioned in the lower court opinion in *McCarthy*, and was not raised, briefed, or otherwise argued before this Court, thereby rendering respondents' reliance on *McCarthy* for this point all the more suspect. Moreover, the Court in *McCarthy* never

reached the meaning of the word "available," and so did not address whether a grievance procedure that refused to permit an award of monetary relief provided an "available" "remedy" under § 1997e(a). *See Shalala*, 529 U.S. at 41 (Thomas, J., dissenting) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))). Merely because the Court's *dicta* mentioned the term "effective" does not mean that the Court would have found the remedy sought by the prisoner "available."[6]

IV. RESPONDENTS' POLICY-BASED ARGUMENTS ARE PROPERLY ADDRESSED TO CONGRESS, NOT TO THIS COURT, AND ARE OVERSTATED.

Respondents focus on policy issues in their brief, arguing that requiring exhaustion even when the remedy sought by the prisoner is not available will facilitate prison administration and further the purposes of the PLRA. *See* Resp't Br., at 27-33; United States Am. Br., at 18-23; States Am. Br., at 16-19. Of course, the task for this Court is to interpret the

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[6] In fact, another part of the Court's opinion in *McCarthy* suggests that the Court viewed the words "available" and "remedy" as meaning capable of providing the relief the prisoner sought. In response to the Bureau of Prisons' argument that, "despite the absence of any provision in the general grievance procedure for the award of money damages, such damages in fact are *available* for most prisoners asserting *Bivens* claims," the Court stated, "[t]he *availability* of a money damages *remedy* is, at best, uncertain, and the uncertainty of the administrative agency's authority to award relief counsels against requiring exhaustion." *McCarthy*, 503 U.S. at 154-55 (emphasis added).

statute, not to make policy. For better or worse, while certainly broadening the exhaustion requirement in 1996, Congress chose not to make it unqualified, but, rather, to limit it to "available" "remedies." As this Court recently stated, "it is not the province of this Court to rewrite the statute. . . . We hold as we do because respondent's view seems to us the only permissible interpretation of the text – which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000).

Furthermore, the policy arguments that respondents make are least compelling in a case such as this, where the prisoner seeks money damages as compensation for having been beaten by prison guards – a past, completed constitutional violation. This conclusion is reinforced by Congress's restriction of the exhaustion requirement in § 1997e(a) to actions "with respect to prison conditions," which arguably does not even encompass excessive force or intentional assault claims brought by a prisoner against individual guards. *See Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), *petition for cert. filed*, No. 00-853 (U.S. Nov. 22, 2000). *But see Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000).

In addition, respondents' policy arguments in support of exhaustion ignore the heavy burdens placed on prisoners, such as the likelihood of unrepresented prisoners missing the typically truncated grievance procedure filing deadlines and suffering the dismissal of their subsequent federal claims. *See McCarthy*, 503 U.S. at 152-53; *see also* Pet'r Br., at 33-34; American Civil Liberties Union *et al.* Am. Br., at 3, 12-13. Prisoners also face the risks of being prevented from exhausting the grievance system by virtue of being transferred or placed in some type of restrictive housing, or having their grievance barred under vaguely-worded restrictions regarding "abuse" or "misuse" of the system. *See* American Civil

Liberties Union *et al.* Am. Br., at 3, 14-20. But even putting aside these obvious problems with respondents' position, their policy-based arguments are overstated in any event.

First, requiring exhaustion of procedures that cannot provide relief will not "promote[ ] the resolution of prison disputes outside of litigation." Resp't Br., at 29. It is not possible for a system that does not provide monetary damages to "resolve" a dispute as to whether monetary damages are to be awarded. Moreover, respondents offer no support for their assertion that a plaintiff might accept alternative relief. In fact, the acceptance of an unsolicited remedy in lieu of damages is particularly unimaginable where, as here, a prisoner is complaining of a past assault for which no form of relief other than monetary damages is available or appropriate.

Respondents' argument that "administrative proceedings can help to clarify, narrow and focus issues for a court," Resp't Br., at 29, fares no better. First, this Court in *McCarthy* expressly rejected the notion that a prison grievance procedure provides a formal factual record for use by a court. *See McCarthy*, 503 U.S. at 155-56. Indeed, the idea that the prison grievance system could provide a useful factual record is largely a myth because most prison grievance systems do not even make a written report in cases where the prisoner is seeking relief that the system does not provide. *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement*, 86 Cornell L. Rev. 483 (forthcoming March 2001) (manuscript at 134-35).[7]

Moreover, in Pennsylvania, at least, the purported fact-finding benefit that respondents identify is illusory. As Mr. Booth noted in his opening brief (a point to which

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[7] This article was lodged with the Clerk of the Court with the Brief of the American Civil Liberties Union *et al.* as *Amici Curiae* in Support of Petitioner.

neither respondents nor their *amici* responded), the Pennsylvania grievance procedure at issue here provides that all grievance system proceedings are "inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee." 51Ja. Thus, the grievance process in Pennsylvania by definition cannot serve a fact-finding role for later judicial proceedings.

Respondents also argue that administrative procedures are useful to put prisons on notice of problems. Resp't Br., at 30. While there can be no doubt that there is a benefit to prisons knowing of problems, respondents' argument goes too far because, in fact, Congress chose not to require exhaustion in all cases, but only in cases where the prison can provide a remedy. In any event, there is no evidence that an administrative grievance will put prisons on notice of problems any better than will a complaint in court, or that instances of serious misconduct will go undetected by prison officials. In fact, one could just as easily argue that a complaint will more quickly and effectively attract the prison's attention and lead to the resolution of problems than will a grievance for which the prison can do nothing in response.

Respondents' further argument that Mr. Booth's approach "would enable prisoners to bypass administrative processes at will," Resp't Br., at 32, is belied by the available empirical evidence. First, a prisoner, like any other plaintiff, may sue for a variety of remedies and there is no reason to believe that the prisoner with meritorious injunctive claims will abandon them completely simply to "get to court" as soon as possible. To the contrary, given that filing a complaint costs money (even under the 28 U.S.C. § 1915(b) *in forma pauperis* installment plan) and may cost the *in forma pauperis* prisoner plaintiff one of his or her three lifetime "strikes" under 28 U.S.C. § 1915(g), a prisoner will be particularly circumspect in bringing a lawsuit, particularly if, in fact, the problem of

which s/he complains can be remedied through the prison grievance system.

Moreover, despite respondents' cries of alarm that a plain reading of the statute will lead to a flood of prisoner suits as plaintiffs manipulate their complaints to seek only monetary damages, the evidence belies this assertion. In the two years after the Fifth and Ninth Circuits held that prisoners need not exhaust administrative remedies that could not provide the relief they sought,[8] filings of civil rights complaints by prisoners in those circuits dropped 4.9 and 8.4 percent respectively, while total filings of prisoner civil rights complaints in all federal courts dropped only 3.6 percent. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2000 Report of the Director, tbl. C-3; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1998 Report of the Director, tbl. C-3. Certainly, these numbers call into doubt the validity of respondents' unsupported assertion that prisoners will evade the exhaustion requirement and flood the federal courts with damages-only claims.[9]

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[8] *See Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998); *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998).

[9] The United States argues that requiring administrative exhaustion even when the remedy sought is not available will further the statutory purpose of reducing the volume of frivolous prisoner litigation because (1) a prisoner who "diligently pursues" the prison grievance system is less likely to file a frivolous complaint, and (2) a prisoner who files a grievance and receives a negative response "may well be persuaded that the claim lacks sufficient merit to pursue in court." United States Am. Br., at 19. However, there is no reason to infer that the merits of a prisoner's complaint is connected to the prisoner's willingness to go through the grievance procedure (particularly where no available remedy exists under

CONCLUSION

For the foregoing reasons and for those set forth in petitioner's opening brief, petitioner Timothy Booth respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit and remand for further proceedings under which the district court is required to consider the merits of Mr. Booth's complaint.

Respectfully submitted,

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that procedure). Furthermore, it is unlikely that a prisoner receiving an unfavorable grievance response will forgo his or her claim where, as here, that response is based not on the merits of the grievance, but on the fact that the grievance procedure could not provide the relief sought.

Moreover, as Mr. Booth demonstrated in his opening brief, other provisions of the PLRA specifically provide federal courts with the authority to dismiss frivolous cases quickly without addressing the exhaustion issue. *See* Pet'r Br., at 42-43 & n.17. Given these other provisions, the exhaustion requirement will not reduce the volume of frivolous lawsuits.

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No. 99-1964

In the Supreme Court of the United States

TIMOTHY BOOTH, PETITIONER

v.

C.O. CHURNER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the exhaustion provision of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a) (Supp. IV 1998), requires an inmate seeking money damages to exhaust prison administrative remedies that address the problem identified by the inmate, but do not permit the recovery of money damages.

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INTEREST OF THE UNITED STATES

This case presents the question whether the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a) (Supp. IV 1998), requires an inmate seeking money damages to exhaust prison administrative remedies that address the problem identified by the inmate, but do not permit the recovery of money damages. The United States has a substantial interest in the resolution of that question. Pursuant to its authority to manage federal prisons, the Federal Bureau of Prisons (BOP) has adopted an administrative remedy program through which inmates may seek review of issues relating to their confinement. See 28 C.F.R. 542.10 *et seq.* That remedy program does

not permit the recovery of money damages. Inmates also frequently name BOP officials as defendants in actions arising from conditions of confinement in federal correctional institutions. The court's decision in this case will affect both the efficacy of BOP's administrative remedy program and the conduct of litigation against BOP officials.

STATEMENT

1. a. At the time of the events in question, petitioner was confined at the State Correctional Institution at Smithfield Bradford Pennsylvania (SCI Smithfield) in Huntington, Pennsylvania. In April 1997, petitioner filed suit in federal district court against four prison officials (respondents), complaining about his treatment at SCI Smithfield. In his original pleading, petitioner focused on four incidents that allegedly occurred at SCI Smithfield. J.A. 15-16.

First, petitioner alleged that, in April 1996, he was assaulted by two prison guards, causing his shoulder to slip in and out, and that he was subsequently denied an operation to repair his shoulder. J.A. 15. Second, petitioner alleged that, on February 6, 1997, he threw water on a prison guard, and the guard retaliated by throwing a cup of cleaning material in his face. *Ibid.* Third, petitioner alleged that, on February 7, 1997, he exchanged words with respondent Rikus, who then shoved him into a shelf in the storage room. Another officer allegedly pushed petitioner into the door, and still another officer tightened and twisted his handcuffs. J.A. 15-16. Fourth, petitioner alleged that, on March 23, 1997, respondent Churner punched him in the face while respondent Workensher and another officer looked on. J.A. 16. As a result, petitioner's mouth was

allegedly "busted open" and required three stitches. *Ibid.*

In subsequent pleadings, petitioner added additional claims. He alleged that prison officials interfered with his ingoing and outgoing mail, J.A. 19, prevented him from using the library or obtaining access to legal assistance, J.A. 19, 22, denied him food, J.A. 22, denied him due process in a misconduct hearing, J.A. 23, and put a sign on his door stating that he was a "cry baby." *Ibid.*

In his original pleading, petitioner requested that the court transfer him to another prison and punish each of the officers involved in the alleged assaults. J.A. 9, 16. In a subsequent pleading, petitioner sought an injunction against further beatings, an order to obtain an operation, the appointment of counsel, money damages in various amounts, a permanent transfer, an order to permit inmates in segregation to use the law library, an order holding prison officials in contempt, and an order to hire a paralegal. J.A. 26-27.

b. The Pennsylvania Department of Corrections has a grievance system "through which resolution of specific problems can be sought." J.A. 40. Under that system, an inmate may submit a formal written complaint related to a problem encountered during the course of confinement. J.A. 41. The complaint must be submitted for initial review within fifteen days of the events giving rise to the complaint. J.A. 46. The complaint is then referred to a Grievance Officer for investigation and resolution. J.A. 47. An inmate who has requested a personal interview "shall be interviewed." *Ibid.* Within ten working days after the Grievance Officer receives the complaint, "the grievant shall be provided a written response to the grievance to include a brief rationale, summarizing the conclusions

and any action taken or recommended to resolve the issues raised in the grievance." *Ibid.*

An inmate may appeal the initial determination to an intermediate reviewing authority. J.A. 47. Such an appeal must be filed within five days from the date on which the inmate receives the initial decision. J.A. 47-48. Within ten working days after receiving the appeal, the intermediate reviewing authority must notify the inmate of his or her decision and supply a brief explanation of the basis for it. J.A. 48.

Within seven days after receiving a decision from the reviewing authority, an inmate may file a final appeal. J.A. 48-49. The final reviewing authority may require additional investigation before deciding that appeal. J.A. 49. The final reviewing authority has 21 days to issue its decision, and the decision must include a brief statement of reasons. J.A. 49-50. At the time that petitioner filed his complaint, the State's grievance program addressed complaints about the use of excessive force, but it did not permit the recovery of money damages. The State has since amended its grievance policy to permit the recovery of money damages. J.A. 60.

c. The PLRA contains a provision that requires an inmate to exhaust available administrative remedies before filing suit. That provision specifies that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. IV 1998).

Before filing suit in district court, petitioner had filed an initial administrative grievance relating to at least some of the issues raised in his district court pleadings.

J.A. 10-13. Petitioner did not seek intermediate or final review, however, on any issue contained in his district court pleadings. Pet. App. 6a n.2. The district court, acting sua sponte, dismissed petitioner's action without prejudice, on the ground that petitioner had failed to exhaust administrative remedies as required by Section 1997e(a). *Id.* at 36a-39a.

2. The court of appeals affirmed. Pet. App. 1a-28a. The court rejected petitioner's argument that exhaustion of administrative remedies was not required because the prison's administrative process did not permit the recovery of money damages. *Id.* at 3a. The court of appeals relied on its holding in *Nyhuis* v. *Reno*, 204 F.3d 65, 67 (3d Cir. 2000), that the PLRA makes the exhaustion of administrative remedies mandatory "whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." Pet. App. 3a.

In *Nyhuis*, the court based its interpretation on the change in the statutory language of Section 1997e(a) effected by the PLRA. 204 F.3d at 72. As explained in *Nyhuis*, before enactment of the PLRA, a plaintiff could be required to exhaust such "*plain, speedy, and effective* remedies *as are available.*" *Id.* at 70. The PLRA removed the qualifiers "plain, speedy, and effective." *Id.* at 72. The effect of that change, the *Nyhuis* court concluded, is that an inmate must now exhaust available prison remedies, without regard to whether they are "effective." *Ibid.*

The court in *Nyhuis* rejected the view that the term "available" in the new provision creates a futility exception to exhaustion. 204 F.3d at 72-73. The court explained that such an interpretation would reintroduce the very inquiry into the effectiveness of administrative remedies that Congress had deliberately elimi-

nated. *Ibid.* By using the term "available," the court of appeals concluded, "Congress merely meant to convey that if a prison provided no internal remedies, exhaustion would not be required." *Id.* at 73.

The court in *Nyhuis* also emphasized that a principal purpose of the new exhaustion requirement was to reduce the volume of frivolous prison litigation in federal courts. 204 F.3d at 73-74. That purpose would be thwarted, the court explained, if inmates could avoid the exhaustion requirement simply by asking for money damages. *Id.* at 74. The court also stressed that a broad exhaustion requirement would give a prison institution a chance to correct its own errors, reduce the need for judicial intervention, and improve the efficacy of the administrative process. *Id.* at 75.

The court of appeals in this case noted that *Nyhuis* involved a claim brought by a federal inmate, rather than a claim brought by a state inmate like petitioner. Pet. App. 3a. Since the PLRA treats a *Bivens* action and an action under Section 1983 as "functional equivalents," however, the court viewed the decision in *Nyhuis* as "controlling in this case." *Ibid.*[1]

SUMMARY OF ARGUMENT

A. The PLRA conditions its exhaustion requirement on the existence of administrative "remedies" that are "available." 42 U.S.C. 1997e(a) (Supp. IV 1998). Under the ordinary meaning of those terms, Section 1997e(a) requires an inmate to exhaust administrative remedies as long as the administrative process will address the kind of problem identified by the inmate's complaint.

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[1] The court of appeals also held that a suit alleging that a prison guard has used excessive force is an "action . . . with respect to prison conditions" within the meaning of Section 1997a(e). Pet. App. 8a-19a. That holding is not at issue here.

Exhaustion is not excused simply because the administrative process does not permit an inmate to recover the relief that the inmate would like.

Thus, if a prison administrative process does not review complaints about excessive force, "administrative remedies" would not be "available" for that kind of complaint. If the grievance procedure addresses complaints about excessive force, however, the absence of a damages remedy would not show that administrative remedies for that kind of complaint are unavailable. A prison grievance procedure can offer other "remedies" for complaints about excessive force, such as disciplining the officer involved, retraining the officer, transferring the inmate involved to a different area of the prison, or issuing a decision that the inmate's complaint is meritorious and the guard's conduct should not be repeated. In such circumstances, the institution would have "administrative remedies" that are "available" to inmates who wish to complain about a guard's use of excessive force, and the inmate would be required to exhaust the prison's grievance process before filing a suit challenging a guard's use of excessive force.

The PLRA's broad and categorical exhaustion requirement reflects a deliberate change from the exhaustion requirement in prior legislation. Before Section 1997e(a) was amended by the PLRA, a court had discretion to require a state inmate to exhaust "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. 1997e(a) (1994). In *McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992), this Court construed the term "effective" in Section 1997e(a) to excuse exhaustion when an inmate seeks only money damages and the prison's grievance procedure does not offer such relief. In that legal context, Congress's elimination of the term "effective" from Section

1997e(a) can have only one meaning: Congress was dissatisfied with the outcome in *McCarthy*, and it wished to require exhaustion of available administrative remedies, even when an inmate seeks only monetary relief and the administrative process does not offer such relief.

In addition to eliminating the term "effective" from Section 1997e(a), Congress also (1) eliminated the terms plain and speedy, (2) eliminated the requirement that administrative procedures must satisfy certain minimum acceptable standards of fairness and effectiveness before inmates can be required to exhaust them, and (3) eliminated a court's discretion to excuse exhaustion when it would not be appropriate and in the interests of justice. Those dramatic changes in Section 1997e(a) reflect one overriding theme: Congress no longer wanted its statutory exhaustion requirement to track the traditional exhaustion doctrine under which courts have discretion to excuse exhaustion when they conclude that an administrative remedy is inadequate. In its place, Congress substituted a broad mandatory exhaustion requirement.

B. In imposing a strict exhaustion requirement, Congress was animated in large part by a desire to arrest the alarming upward trend in the volume of frivolous prison litigation. Inmates who diligently pursue their claims through a prison's entire administrative process are far less likely to pursue a frivolous claim in court than inmates who deliberately bypass the administrative process or neglect to observe the applicable administrative deadlines for filing complaints and pursuing administrative appeals. The exhaustion provision also works in tandem with the "three strikes" provision of the PLRA, 28 U.S.C. 1915(g) (Supp. IV 1998), which precludes inmates from bringing suits *in forma*

pauperis after they have had three or more cases dismissed as frivolous, malicious, or for failure to state a claim. After an administrative claim has been rejected as insubstantial, an inmate may well refrain from filing suit in court on that claim when the consequence may be a loss of *in forma pauperis* status for other, more meritorious, complaints.

Because Congress viewed an exhaustion requirement as an important means of reducing the volume of frivolous prison litigation, it understandably wanted to eliminate the exception to exhaustion that this Court had recognized in *McCarthy*. If Congress had carried that exception forward, inmates would have been able to evade the exhaustion requirement through the simple expedient of limiting their complaints to requests for money damages, and Congress's purpose of deterring frivolous lawsuits would have been undermined.

C. Other considerations that have particular force in the prison setting also help to explain why Congress imposed a broad mandatory exhaustion requirement on inmates. Such a requirement gives prison authorities an opportunity to investigate and evaluate prisoner complaints in the first instance. It helps to ensure that inmates bring dangerous conditions or abusive practices to the attention of responsible prison officials quickly, so that prison officials can take corrective action before the problem becomes even more serious. The airing of a grievance in a less adversarial setting can help to reduce tensions that might otherwise exist. In some cases, an inmate's complaint can be resolved in the grievance process even when the inmate seeks only money damages. And even when a complaint is not resolved, exhaustion can lead to a fuller understanding of the nature of the inmate's complaint.

ARGUMENT

SECTION 1997e(a) REQUIRES AN INMATE TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES, WITHOUT REGARD TO WHETHER THE ADMINISTRATIVE PROCESS PERMITS THE RECOVERY OF THE RELIEF THAT THE INMATE SEEKS IN THE JUDICIAL ACTION

Petitioner contends (Br. 12-13) that the PLRA's exhaustion provision, 42 U.S.C. 1997e(a) (Supp. IV 1998), does not require an inmate to exhaust administrative remedies when the inmate seeks only monetary relief and the grievance procedure does not offer such relief. In addition to seeking monetary relief, however, petitioner sought various other forms of relief in the district court, J.A. 9, 16, and the administrative grievance procedure could have provided at least some of those forms of relief. The question presented by petitioner's complaint is therefore whether exhaustion is required when an inmate seeks monetary and other relief and the administrative grievance process does not provide all the relief that the inmate seeks.[2]

For purposes of the analysis we present here, however, it does not matter whether an inmate seeks only money damages or money damages and other forms of relief. As the court of appeals concluded, the PLRA's

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[2] Petitioner contends (Br. 12) that his claims for relief other than money damages became moot when he was transferred to another institution. The transfer did not moot all petitioner's requests for relief. J.A. 26-27 (seeking, *inter alia*, an order to obtain an operation). In any event, the text of the PLRA's exhaustion provision specifies that "no action shall be brought" unless administrative remedies have been exhausted. 42 U.S.C. 1997e(a) (Supp. IV 1998). The requirement of exhaustion therefore depends on the circumstances that exist at the time that an inmate files a complaint, not on what transpires thereafter.

exhaustion provision requires an inmate to exhaust administrative remedies as long as the administrative process will address the kind of problem identified by the inmate's complaint. Exhaustion is not excused simply because the administrative process does not permit an inmate to recover the relief that the inmate would like. Thus, when an administrative process will address the kind of problem identified by the inmate's complaint, exhaustion is required even when the inmate seeks only money damages and the prison grievance procedure does not offer such relief. Under that same analysis, an inmate seeking money and other relief would also have to exhaust available administrative remedies.

A. The Text Of The Act Requires Exhaustion Of Administrative Remedies Without Regard To Whether The Administrative Process Offers The Form Of Relief Sought By The Inmate

1. The text of the PLRA exhaustion provision supports the court of appeals' interpretation. That statutory text conditions the requirement of exhaustion on the existence of administrative "remedies" that are "available." 42 U.S.C. 1997e(a) (Supp. IV 1998). The term "remedy" means "the legal means to recover a right or to prevent or obtain redress for a wrong," *Webster's Third New International Dictionary* 1920 (1993), and "available" means "capable of use for the accomplishment of a purpose," *id.* at 150.

Under those definitions, "administrative remedies" are "available" when the prison grievance procedure provides a "means" to "obtain redress" for the kind of "wrong" identified by the inmate, and the administrative procedure is "capable of use" by the inmate "for the accomplishment of [that] purpose." As the court of

appeals explained in *Nyhuis*, "the administrative process * * * must be capable of addressing the events that could generate a lawsuit." 204 F.3d at 75 n.9. Contrary to petitioner's contention (Br. 15-16), however, those definitions do not suggest that administrative remedies are unavailable simply because the administrative process does not offer to redress the kind of wrong identified by the inmate *in the manner that the inmate desires.*

An example helps to illuminate the distinction. If a prison administrative process does not review complaints about excessive force, "administrative remedies" would not be "available" for that kind of complaint since the grievance process would not be "capable of use" by an inmate to "obtain redress" for the "wrong" of excessive force. If the grievance procedure addresses complaints about excessive force, however, the absence of a damages remedy would not show that administrative remedies for that wrong are unavailable. A prison grievance procedure can offer other forms of "redress" for the "wrong" of excessive force, such as disciplining the officer involved, retraining the officer, transferring the inmate involved to a different area of the prison, or issuing a decision that the inmate's complaint is meritorious and the guard's conduct should not be repeated. In such circumstances, the institution would have "administrative remedies" that are "available" to inmates who wish to complain about a guard's use of excessive force, and the inmate would be required to exhaust the prison's grievance process before filing a suit challenging a guard's use of excessive force.[3]

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[3] Under the regulations that currently govern the Bureau of Prison's Administrative Remedy Program, institutions have dis-

2. The PLRA's broad and categorical exhaustion requirement reflects a deliberate change from the exhaustion requirement that had been imposed on inmates by prior legislation. Before Section 1997e(a) was amended by the PLRA, a court had discretion to require a state inmate to exhaust "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. 1997e(a) (1994). In *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), this Court construed that statutory language in the context of a case in which a federal inmate sought only money damages against federal prison officials, and the Bureau of Prison's administrative procedure did not offer that form of relief. Although Section 1997e(a) did not then apply to suits brought against federal officials, the government argued that the Court should create an analogous exhaustion requirement for *Bivens* actions. *Id.* at 149-150. The Court concluded that Section 1997e(a) "cut against" the government's argument that exhaustion should be required when an inmate seeks only monetary relief and the grievance procedure does not offer that form of relief. *Id.* at 150. In reaching that

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cretion not to consider a prison grievance when "it is clear that the only possible relief is monetary." BOP Program Statement 1330.13(6)(b)(1) (Dec. 22, 1995). Under those regulations, Section 1997e(a) requires exhaustion of money-only claims because prison officials may process a complaint seeking money damages based on the possibility that other relief could be awarded. In those circumstances, the BOP has "remedies available" for inmates who seek only money damages. If BOP returns a grievance seeking money damages without processing it on the ground that no other relief is possible, the inmate would have exhausted administrative remedies. BOP has recently proposed new regulations that would require officials to consider the substance of an inmate's grievance without regard to the specific form of relief sought by the inmate. See 65 Fed. Reg. 39,768 (2000) (to be codified at 28 C.F.R. Pt. 542).

conclusion, the Court relied on the language in Section 1997e(a) that made an "effective" administrative remedy a precondition to exhaustion. *Ibid.* The Court specifically explained that, "in contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, the statute conditions exhaustion on the existence of 'effective administrative remedies.'" *Ibid.* Three Justices concurring in the judgment agreed with the Court that "in cases * * * where prisoners seek monetary relief, the Bureau's administrative remedy furnishes no *effective* remedy." *Id.* at 156 (Rehnquist, C.J., joined by Scalia, J. and Thomas, J., concurring in the judgment) (emphasis added).

Thus, at the time that Congress enacted the PLRA, it understood that, under *McCarthy*, the term "effective" in Section 1997e(a) excused a failure to exhaust administrative remedies when an inmate sought only monetary relief and the administrative process did not offer such relief. In that legal context, Congress's elimination of the term "effective" from Section 1997e(a) can have only one meaning: Congress was dissatisfied with the outcome in *McCarthy*, and it wished to require exhaustion of available administrative remedies, even when an inmate seeks only monetary relief and the administrative process does not offer such relief. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174-176 (1993).

Petitioner contends (Br. 37-38) that Congress's elimination of the term "effective" from Section 1997e(a) affected only "the procedural aspects of the administrative remedy, whereas, in contrast, Congress intended the words 'such administrative remedies as are available'—the words it preserved—to refer to the substantive aspect of whether the remedy could provide

the relief sought." But, as discussed above, *McCarthy* identified the term "effective" as the basis for declining to require exhaustion when the administrative remedy does not provide the relief sought, and Congress eliminated that term based on that understanding. Petitioner's explanation for the removal of the term "effective" simply ignores the decision in *McCarthy* and Congress's response to it.

3. The other changes in Section 1997e(a) reinforce the conclusion that Congress amended Section 1997e(a) for the express purpose of eliminating the exception to exhaustion proposed by petitioner. In addition to eliminating the term "effective" from Section 1997e(a), Congress also (1) eliminated the terms "plain" and "speedy," (2) eliminated the requirement that administrative procedures must satisfy certain "minimum acceptable standards" of fairness and effectiveness before inmates can be required to exhaust them, and (3) eliminated a court's discretion to excuse exhaustion when it would not be "appropriate and in the interests of justice." Compare 42 U.S.C. 1997e(a) (Supp. IV 1998) with 42 U.S.C. 1997e(a) (1994). In place of the previous version of Section 1997e(a), Congress substituted a broad and firm mandate that "[n]o action shall be brought with respect to prison conditions" by an inmate "until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. IV 1998).

The dramatic changes in Section 1997e(a) effected by the PLRA reflect one overriding theme: Congress no longer wanted its statutory exhaustion requirement to track the traditional exhaustion doctrine under which courts have discretion to excuse exhaustion when they conclude that an administrative remedy is inadequate. *McCarthy*, 503 U.S. at 146-149 (discussing the scope of that traditional doctrine). Under the traditional ex-

haustion doctrine, in the absence of a statutory direction to the contrary, courts exercise discretion to excuse exhaustion in a variety of circumstances, including when the administrative process does not establish an adequate time-frame for administrative action, *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 587 (1989), when the agency does not have the authority to grant the relief that is requested, *Reiter* v. *Cooper*, 507 U.S. 258, 269 (1993), and when an agency's prior pronouncements demonstrate that exhaustion would be futile, *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 205-206 (1944). When Congress excised the terms "plain, speedy, and effective," eliminated the requirement that the administrative process satisfy "minimum acceptable standards" of fairness and effectiveness before an inmate can be required to exhaust, and eliminated a court's discretion to dispense with exhaustion when "appropriate and in the interests of justice," it decisively rejected the traditional approach. As the Eleventh Circuit explained in *Alexander* v. *Hawk*, 159 F.3d 1321, 1325 (1998), "the judicially recognized futility and inadequacy exceptions do not survive the new mandatory exhaustion requirement of the PLRA." Instead, "Congress now has mandated exhaustion in section 1997e(a)," and "courts cannot simply waive those requirements where they determine they are futile or inadequate." *Id.* at 1325-1326.

Petitioner nonetheless contends (Br. 23-27) that traditional exhaustion principles should be engrafted onto Section 1997e(a) based on a "presumption" that Congress intends to carry forward "traditional legal concepts." Because Congress's amendments to Section 1997e(a) so clearly demonstrate that Congress did not wish to incorporate traditional exhaustion principles, however, petitioner's reliance on such a presumption is

misplaced. Instead, the principle that is controlling here is that "[w]here Congress specifically mandates, exhaustion is required." *McCarthy*, 503 U.S. at 144. As the Court explained in *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), when exhaustion is statutorily mandated as a precondition to suit, "[t]he requirement * * * may not be dispensed with merely by a judicial conclusion of futility."

4. In sum, as the text of the Act makes clear, an inmate must exhaust available administrative remedies even when a grievance procedure does not provide the remedy that the inmate seeks. As long as the grievance process addresses the kind of problem identified by the inmate, exhaustion is mandatory.[4]

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[4] All of the legislative history, including the one statement identified by petitioner, is consistent with that interpretation. H.R. Conf. Rep. No. 378, 104th Cong., 1st. Sess. 166 (1995) ("Section 803 amends the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997a(c)) to require that administrative remedies be exhausted prior to any prison conditions action being brought under any federal law by an inmate in federal court."); H.R. Rep. No. 21, 104th Cong., 1st Sess. 7 (1995) (The exhaustion provision "requires that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court."); 141 Cong. Rec. 4275 (1995) (Rep. Canady) ("Title II of the bill will * * * forc[e] prisoners to exhaust all administrative remedies before bringing suit in Federal court."); *id.* at 14,571 (Sen. Dole) ("The act also requires State prisoners to exhaust all administrative remedies before filing a lawsuit in Federal court."); *id.* at 14,573 (Sen. Kyl) ("Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.").

B. The PLRA's Special Exhaustion Requirement Advances Congress's Intent To Deter The Filing Of Frivolous Complaints

In imposing a strict exhaustion requirement, Congress was animated in large part by a desire to arrest the alarming upward trend in the volume of frivolous prison litigation. Congress was deeply concerned that inmates were overwhelming the courts with frivolous complaints. As one supporter of the PLRA explained, Congress was faced with a "flood of frivolous lawsuits brought by inmates. In 1994, over 39,000 lawsuits were filed by inmates in Federal courts, a staggering 15 percent over the number filed the previous year. The vast majority of these suits are completely without merit." 141 Cong. Rec. 27,042 (1995) (Sen. Hatch).

Congress believed that one important reason that frivolous prisoner litigation was increasing was that this Court in *McCarthy* had excused inmates from exhausting administrative remedies when they sought only money damages. As one member of Congress explained:

> The real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a Bivens action for money damages only. * * * Since 1993 there has been a total of 1,365 new Bivens cases filed in Federal court tying up the time of Federal judges and lawyers for the Bureau of Prisons at a time when we already have overcrowded dockets.

141 Cong. Rec. at 35,623 (Rep. LoBiondo). By "forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court," Congress sought to "significantly curtail the ability of prisoners to bring

frivolous and malicious lawsuits." *Id.* at 35,624 (Rep. Canady); *ibid.* (Rep. LoBiondo) (an exhaustion requirement "would aid in deterring frivolous claims"); see also H.R. Rep. No. 21, *supra*, at 7 ("The title addresses the problem of frivolous lawsuits in three significant ways. First, it requires that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court.").

Congress's judgment that exhaustion would reduce the volume of frivolous prison litigation is supported by the special features of prison grievance procedures. Prison administrative procedures ordinarily require inmates to file their grievances within a short time after the incident giving rise to the complaint; inmates also must observe strict deadlines for processing appeals; and inmates who deliberately abuse a prison's grievance process may be subject to disciplinary action. J.A. 44-48. In light of those features of prison grievance procedures, inmates who diligently pursue their claims through a prison's entire administrative process are far less likely to pursue a frivolous claim in court than inmates who deliberately bypass the administrative process or neglect to observe the applicable administrative deadlines. See 141 Cong. Rec. at 35,624 (Rep. LoBiondo) (An exhaustion requirement "would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a Bivens action, only those claims with a greater probability/magnitude of success would, presumably, proceed.").

A requirement of administrative exhaustion helps to reduce the volume of frivolous litigation for a second reason. When an inmate receives an administrative response rejecting a claim and explaining the reasons why, J.A. 47, the inmate may well be persuaded that the claim lacks sufficient merit to pursue in court. In

that respect, the exhaustion provision works in tandem with the "three strikes" provision of the PLRA, 28 U.S.C. 1915(g) (Supp. IV 1998), to deter the filing of frivolous complaints. The "three strikes" provision precludes inmates from bringing suits *in forma pauperis* after they have had three or more cases dismissed as frivolous, malicious, or for failure to state a claim. 28 U.S.C. 1915(g) (Supp. IV 1998). After an administrative claim has been rejected as insubstantial, an inmate may well refrain from filing suit in court on that claim when the consequence may be a loss of *in forma pauperis* status for other, more meritorious, complaints.

Because Congress viewed an exhaustion requirement as an important means of reducing the volume of frivolous prison litigation, it understandably wanted to eliminate the exception to exhaustion that this Court had recognized in *McCarthy*. As the Third Circuit explained in *Nyhuis*, if Congress had carried that exception forward, inmates would have been able "to evade the exhaustion requirement, merely by limiting their complaints to requests for money damages," and Congress's purpose of deterring frivolous lawsuits would have been "undermined." 204 F.3d at 74. The Seventh Circuit similarly has explained that "Section 1997e would not be worth much if prisoners could evade it simply by asking for relief that the administrative process is unable to provide." *Perez* v. *Wisconsin Dep't of Corrections*, 182 F.3d 532, 537 (1999).

C. The PLRA's Special Exhaustion Requirement Is Also Supported By Other Considerations That Have Particular Force In The Prison Setting

1. Other considerations that have particular force in the prison setting also help to explain why Congress

imposed a broad mandatory exhaustion requirement on inmates. First, prison authorities are in the best position to investigate and evaluate prisoner complaints in the first instance and to decide what corrective action, if any, to take. Courts are "ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974). The proper response to prison grievances falls squarely within the expertise of prison officials, and, in general, courts owe deference to the solutions chosen by those officials. *Bell* v. *Wolfish*, 441 U.S. 520, 547 n.29 (1979). Thus, it is appropriate for courts to exercise jurisdiction only after prison officials have had the opportunity to address the problem raised by an inmate's complaint.

Second, exhaustion of administrative remedies helps to ensure that inmates bring dangerous conditions or abusive practices to the attention of responsible prison officials quickly, so that prison officials can take corrective action before the problem becomes even more serious. An inmate who has been abused by a prison guard may only be interested in money damages or some other remedy that the institution does not offer. But the institution has an overriding interest in learning about that incident quickly so that it can make sure that the guard does not abuse that inmate or any other inmate again. The PLRA's exhaustion requirement promotes that interest.

Third, a prison grievance process has the potential to be a far less adversarial and far more cooperative means for resolving inmate complaints than litigation in federal court. When inmates can bypass the administrative process and immediately name their guards as defendants in lawsuits, it can needlessly exacerbate the tensions that exist in a prison. Even when the inmate

is only interested in a remedy that the institution does not offer, airing the grievance in a less adversarial setting can help to reduce the tensions that might otherwise exist.

Fourth, in some cases in which inmates seek a remedy that the grievance process does not offer, exhaustion of that grievance process can still lead to a resolution of the complaint. Sometimes, the opportunity to air a grievance and to receive a response may turn out to be all that the inmate really wanted. Sometimes the institution may take corrective action that satisfies the inmate, even if it is not the action that the inmate would have preferred. And, as noted above, sometimes the administrative rejection of a claim may persuade the inmate that the claim is not worth pursuing in court.

Finally, when exhaustion of the administrative process does not lead to a resolution of the complaint, it nonetheless can lead to the development of a factual record and a fuller understanding of the nature of the inmate's complaint. In general, complaints filed by inmates in court are notoriously difficult to decipher. Exhaustion of administrative remedies may help inmates to make their complaints more understandable. Even if exhaustion does not have that effect, the administrative record may help the court to understand the nature of the inmate's complaint. The administrative process may also put the government in a much better position to move for summary judgment based on qualified immunity or on other grounds and to avert the extraordinary costs of discovery that may arise when an inmate is free to question prison officials. Congress thus had numerous reasons to require an inmate to exhaust available administrative remedies

without regard to whether the administrative process offers the precise remedy that the inmate seeks.

2. Petitioner contends (Br. 27-34) that exhaustion should not be required when an inmate seeks only monetary relief because the burden of exhaustion in that context outweighs its benefits. For the most part, however, petitioner either ignores the benefits that we have identified or asserts without support that those benefits do not arise when an inmate seeks only money damages. Petitioner's evaluation of the costs and benefits of exhaustion therefore greatly understates the benefits.

Nor is petitioner correct in asserting (Br. 29, 32) that an institution waives the important interests in exhaustion we have identified by failing to offer monetary relief. The question whether to offer money damages as a component of a prison grievance procedure raises fundamental policy questions that must be initially addressed by the legislative branches of government. Some States may believe that an offer of money damages will make a prison grievance procedure more effective. Others may conclude that including money damages as an element of relief would be counterproductive. A State that makes the latter choice does not waive the important interests in exhaustion that we have identified.

Petitioner's effort to seek an exception to the exhaustion requirement based on a balancing of its costs and benefits is subject to an even more fundamental objection. Under Section 1997e(a), a court no longer has discretion to weigh the costs and benefits of requiring an inmate to exhaust administrative remedies. Congress has weighed the costs and benefits itself and has mandated exhaustion in all cases in which a

grievance procedure addresses the kind of problem identified in an inmate's complaint.

D. Petitioner's Remaining Contentions Are Unpersuasive

Petitioner advances several additional arguments in support of his contention that exhaustion is not required when the administrative process does not offer the remedy that the inmate seeks. None of those arguments is persuasive.

1. Petitioner first contends (Br. 17-18) that *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192 (1944), interpreted "available remedies" to mean that the administrative process must supply the very remedy sought. Petitioner further argues (Br. 17-18) that the PLRA should be interpreted to conform to that "well known" meaning. In *Steele*, however, the Court held only that an individual union member did not have an administrative remedy available from an adjustment board when "[t]he Adjustment Board ha[d] consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization." 323 U.S. at 205. We have acknowledged that when an administrative agency fails "to entertain grievance complaints" of a particular kind, an administrative remedy is not "available." That is very different, however, from saying that a remedy is unavailable when an administrative body will "entertain grievance complaints," but will not provide the precise relief that is requested.

Petitioner also attempts to read far too much into several sentences in an opinion written 50 years before the enactment of the PLRA. *Steele* did not purport to apply a well-established meaning of the term "available remedies," and that decision did not purport to establish a definition of those terms. The meaning of

those terms in the PLRA exhaustion provision therefore cannot reasonably be drawn from that decision. Regardless of how the Court used those terms in 1944, the Congress that enacted the PLRA in 1995 did not use those terms to excuse exhaustion any time an administrative procedure does not offer the remedy preferred by an inmate. As we have explained, any such interpretation would reintroduce into the statute the very inquiry into the "effectiveness" of a prison institution's administrative remedies that Congress deliberately eliminated.

2. Petitioner argues (Br. 19-21) that the court of appeals has rendered the terms "available" and "remedies" superfluous because it has equated them with any existing grievance procedure. That argument rests on a misreading of the court of appeals' decision. The Third Circuit carefully explained in its decision in *Nyhuis* that "for the administrative process to constitute a bar, it must be capable of addressing the events that could generate a lawsuit." 204 F.3d at 75 n.9. The court added that "[i]f, for example, the only grievance procedure available dealt *exclusively* with work assignments, it would not have to be exhausted unless the subsequent lawsuit was related thereto." *Ibid.* The court of appeals' interpretation of available remedies therefore gives content to those terms. Petitioner's interpretation, on the other hand, gives them a meaning that cannot be reconciled with the statutory text as a whole or with Congress's intent.

3. Finally, petitioner seeks to derive support for his interpretation from Congress's failure to enact a different bill that contained an exhaustion requirement. That bill provided in part that "[t]he fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in

the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them." Br. 39-40 (quoting Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong., 1st Sess. § 4048 (1995)). Failed legislative proposals, however, are almost always an unreliable basis for discerning Congress's intent in enacting a different bill. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook County* v. *Army Corps of Engineers*, No. 99-1178 (Jan. 9, 2001), slip op. 9.

The only evidence from the legislative history concerning why Congress did not enact the language identified by petitioner is that it regarded it as superfluous. 141 Cong. Rec. at 35,623-35,624 (Rep. LoBiondo) (explaining that the bill Congress enacted imposed the same exhaustion requirement as the bill identified by petitioner). Congress may also have been concerned that the language identified by petitioner might suggest by negative implication that a court could excuse exhaustion in other circumstances. The reason that Congress did not include the language identified by petitioner, however, is ultimately unknowable. That is why Congress's intent must be derived from the language that Congress enacted, and not from the language that it did not enact. Here, the language that Congress enacted mandates exhaustion of available remedies without regard to whether the grievance process offers the remedy that the inmate seeks.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AND THE PRISON REFORM ADVOCACY CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners.

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

The Prison Reform Advocacy Center (PRAC) is a non-profit organization dedicated to progressive prison reform. Based in Cincinnati, PRAC was founded in 1997 to address the legal needs of Ohio's growing prison population. Through its Grievance Project, PRAC works to improve the grievance process in the prison systems of Ohio and other states.[1]

SUMMARY OF ARGUMENT

The Petitioner alleges that he was the subject of several past incidents of excessive force by prison staff. The question presented is whether 42 U.S.C. § 1997e(a), a portion of the Prison Litigation Reform Act (PLRA) that requires the exhaustion of "available" remedies, requires a prisoner like

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[1]No counsel for any party authored any part of this brief. No persons or entities other than the amici curiae made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

Petitioner, who seeks only damages, to exhaust administrative grievance procedures that do not provide damages.

As a matter of common sense and plain meaning, an administrative procedure that bars the only form of relief sought–and, in this case of a completed violation, the only relief that could be meaningful–is not an "available" remedy. This view is further supported by decisions applying mandatory exhaustion requirements that have held that relief is not "available" when the agency has no power to grant it; that the availability of one form of relief does not require a litigant to exhaust if he seeks entirely different relief; and that even when a final agency decision is a usual prerequisite to federal court review, the requirement is excused when the administrative process would be futile because it cannot provide the requested relief or resolve the contested issue.

Congress is presumed to know this Court's basic rules of statutory construction, and its enactments should be construed as consistent with those rules absent a clear statement to the contrary. Yet the PLRA language holds no hint that 42 U.S.C. § 1997e(a) was intended as an exception to this Court's interpretation of statutory exhaustion requirements. Indeed, the reference to "available" remedies affirmatively supports Petitioner's argument, particularly because Congress rejected language that would have required exhausting remedies regardless of their availability. Petitioner's damage claim should therefore be allowed to proceed.

This conclusion is buttressed because prison grievance systems are generally not designed to make retrospective findings and judgments of the sort necessary for an award of damages. Rather, they are designed to resolve current problems and ongoing complaints. They are therefore characterized by very short filing and appeal deadlines, generally a matter of days. Requiring exhaustion of such remedies may be appropriate for ongoing or recurrent problems; if a prisoner makes a procedural error and is barred, the issue can be renewed later in a new grievance. But a prisoner who misses a short deadline for a

completed violation may find his claim procedurally barred first in the grievance system, and then in court. This result would be particularly unjust given the low literacy rates and lack of legal sophistication among prisoners. Further, many of the most serious occurrences for which prisoners seek damages–assaults by staff or other prisoners and serious medical problems–may result in the prisoner's incapacitation, hospitalization, or placement in isolated housing during the crucial period when the grievance must be filed. Examination of numerous states' grievance systems shows that there are many other technical rules and requirements that may defeat a grievance. As with time limits, they may not only delay resolution of grievances concerning ongoing problems, but may also forever bar meritorious claims of completed constitutional violations.

Requiring damage claimants to exhaust procedures that do not provide damages also fails to serve the statutory purposes and policy reasons invoked to justify it. This Court previously recognized in McCarthy v. Madigan, 503 U.S. 140 (1992), that the basic policy reasons for exhaustion–protecting agency authority and promoting judicial efficiency–are not served by requiring the futile exhaustion of damage claims. It is unrealistic to suggest that prisoners will omit non-damage claims so they can evade the exhaustion requirement, since it assumes prisoners will value evading exhaustion more than seeking a remedy for their injuries, and since the existence of a viable injunctive claim is not within the litigant's control. It is unpersuasive to cite the burden on federal courts of analyzing the "vagaries" of state grievance processes, since federal courts must construe state law as part of their daily business, and prison grievance procedures have been construed without difficulty by the courts.

Requiring exhaustion of claims that the grievance process cannot resolve will not conserve judicial resources; the cases will still come to court, unless the prisoner makes a technical mistake and is barred. Prison grievance procedures will not create a useful record, since they are rarely on the

record and since prisoner claims under 42 U.S.C. § 1983 are heard de novo in federal court. For the same reason, non-exhaustion in damage cases will neither interrupt the administrative process nor deprive the agency of a chance to remedy its own errors. The administrative proceeding and the § 1983 adjudication are completely independent of each other, and the administrative process is free to correct errors or take other action regardless of what happens in court. Mandating universal exhaustion will not foster improvements in the administrative system, since if prisoners are required to use the system regardless of its efficacy, the incentive to improve it is undermined. Finally, requiring exhaustion in damage cases will do nothing about the volume of prison litigation, since procedures that don't provide damages won't keep damage cases out of court. Other provisions of the PLRA, such as the requirement that prisoners pay filing fees in installments, and the new provisions for early screening that extend the sua sponte dismissal power to cases that fail to state a claim or seek damages against immune defendants, already make litigation substantially more difficult for prisoner plaintiffs than for other litigants.

ARGUMENT

I. TO BE "AVAILABLE" AN ADMINISTRATIVE REMEDY MUST BE CAPABLE OF PROVIDING THE RELIEF THAT IS REQUESTED.

42 U.S.C. § 1997e(a) provides as follows:

> APPLICABILITY OF ADMINISTRATIVE REMEDIES. No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other federal law, by a prisoner confined in any jail, prison, or other correctional

> facility until such administrative remedies as are available are exhausted.

"Available" is not defined in § 1997e. Where a term is not defined in a statute, this Court construes the term "in accordance with its ordinary or natural meaning." United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994) (citation and internal quotation marks omitted) (considering dictionary definition of "delay" in defining statutory term); cf. Artuz v. Bennett, 121 S. Ct. 361, 363 (2000) (interpreting "properly filed" in Anti-Terrorism and Effective Death Penalty Act consistently with the "commonly understood" meaning of "filed") (citations omitted). In ordinary usage, "available" means "capable of availing; having sufficient power or force to achieve an end." Webster's New International Dictionary 150 (3d ed. 1986). See Whitley v. Hunt, 158 F.3d 882, 887 (5th Cir. 1998) (citing Webster's definition to hold that federal prisoners seeking monetary relief need not exhaust the Bureau of Prisons' administrative grievance system since money damages are unavailable under that system). Under these definitions, a remedy that does not provide damages can hardly be said to be "available" to a litigant who seeks only damages.

Indeed, the Court's past use of "available" in applying statutory exhaustion provisions supports this view. In Reiter v. Cooper, 507 U.S. 258 (1993), this Court considered whether a shipper alleging that a motor carrier's tariff rates were unreasonable was required first to obtain a ruling from the Interstate Commerce Commission on the reasonableness of the rates. This Court rejected that argument:

> Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts, and until that recourse is exhausted, suit is premature and must be dismissed . . . . That doctrine is inapplicable to

> petitioners' reparations claims, because the ICC has long interpreted its statute as giving it no power to decree reparations relief.

Id. at 269 (citations omitted). Similarly, an administrative remedy is not "available" if it is one that cannot grant the requested relief.

Reiter is consistent with this Court's other exhaustion decisions. In Clayton v. International Union, UAW, 451 U.S. 679 (1981), the Court held that an employee claiming both unlawful discharge by the employer and a breach of the duty of fair representation by the union need not exhaust internal union appeals before suing under § 301(a) of the Labor Management Relations Act. The Court noted that "[r]einstatement is available only from the employer,"[2] and the Court held that "these restrictions on the relief available through the internal UAW procedures render those procedures inadequate." Id. at 691-92 (footnote omitted).[3]

Moreover, in enacting the PLRA, Congress acted against the backdrop of this Court's interpretation of previous statutory exhaustion requirements. Of particular note is this Court's treatment of statutory provisions that limit judicial review to review of the final decision of an administrative agency. At first blush, it would appear that, by definition, to obtain such a final decision, the claimant must always exhaust administrative remedies. But this Court interprets such statutes in light of

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[2]Id. at 690 n.15. Monetary relief in the form of backpay was available through the internal grievance procedure.

[3]Clayton did not involve an explicitly mandatory statutory exhaustion requirement, but exhaustion was required because of congressional intent. Congress had "expressly approved" union grievance procedures as a "preferred method" of resolving contract disputes. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965), cited in Clayton, 451 U.S. at 681.

exhaustion doctrine not to require exhaustion of administrative remedies that cannot provide the requested relief.

For example, in Honig v. Doe, 484 U.S. 305 (1988), the Court considered a provision of the Education of the Handicapped Act. The relevant provision, 20 U.S.C. § 1415(e), provided at the time of the case that any party aggrieved by a final decision of the state educational agency could seek judicial review. Despite this explicit requirement of a final decision from the state educational agency, the Court stated that "parents may bypass the administrative process where exhaustion would be futile or inadequate." Id. at 327 (citations omitted).

Similarly, in Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988), this Court rejected an argument that a provision of the Social Security Act providing for review by the Provider Reimbursement Review Board only of a "final determination" of a fiscal intermediary meant that a party must present its claims before the fiscal intermediary even when that intermediary had no authority to declare invalid the regulation that the party wished to challenge. Id. at 404-06.[4] See also Bowen v. City of New York, 476 U.S. 467, 482-85 (1986) (holding that although the Social Security Act made a final agency decision a jurisdictional prerequisite to judicial review, exhaustion of remedies was unnecessary because it would have been futile); McKart v. United States, 395 U.S. 185, 196-197 (1969) (holding that, although Selective Service Act made decisions of local boards final, failure to exhaust administrative remedies did not bar judicial review of questions of statutory interpretation); cf. Shalala v. Illinois Council on Long Term Care, Inc., 120 S. Ct. 1084, 1093, 1097 (2000) (holding that Social Security Act specifically bars resort to general federal jurisdiction statute; this bar "reaches beyond ordinary administrative law principles of

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[4]The Social Security Act itself provided for judicial review when the Provider Reinstatement Review Board determined it was without authority to decide a question. See id. at 406 n.4.

ripeness and exhaustion of administrative remedies;" noting that bar does not apply if administrative review system could not consider the claim) (citations and internal quotation marks omitted).

If Congress had intended to reject the well-established common law principle that remedies need not be exhausted if they cannot provide the relief sought, it would have made this intention explicit in the language of the statute.[5] See McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 496 (1991) (interpreting statute not to foreclose all forms of judicial review in light of presumption that Congress legislates with knowledge of Court's basic rules of statutory construction, including presumption favoring statutory interpretation that allows judicial review of administrative action); accord Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979).

Construing the PLRA exception narrowly is also consistent with the principle that a congressional intention to require exhaustion must be clearly expressed:

> Of paramount importance to any exhaustion inquiry is congressional intent. Where Congress mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.

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[5]Explicit language requiring exhaustion of administrative procedures, including those that do not provide remedies that are available in civil actions, was proposed in H.R. 2468 (Prison Lawsuit Efficiency Act of 1995, or "PLEA"), but this language was rejected by Congress when it enacted the current version of 42 U.S.C. 1997e(a) as part of the PLRA. See Brief of Petitioner, § III.B.

McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (internal quotation marks and citations omitted).[6] Because Congress in 42 U.S.C. § 1997e(a) has not clearly required exhaustion of administrative remedies that cannot provide the requested relief, such exhaustion is not required.

Finally, construing the PLRA exhaustion requirement narrowly is appropriate because § 1997e operates as an exception to the general principle that exhaustion is not required in § 1983 cases.[7] See Commissioner v. Clark, 489 U.S. 726, 739 (1989) (noting that statutory exceptions to general rule are usually read narrowly; where Congress has enacted a general rule, "we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception").

This is not to argue that the PLRA exhaustion requirement is equivalent to the previous statutory requirement, which allowed courts to continue cases for 180 days "if the court believe[d] that such a requirement would be appropriate and in the interests of justice" to allow exhaustion of "such plain, speedy, and effective administrative remedies as are

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[6]The need for a clear expression of congressional intent to require exhaustion follows from the obligation of federal courts to exercise their jurisdiction. "[F]ederal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given them. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Id. at 146 (internal quotation marks and citations omitted).

[7]See Patsy v. Boad of Regents of Florida, 457 U.S. 496, 500-02 (1982) (holding that no exhaustion requirement is appropriate in § 1983 actions in the absence of a statute requiring exhaustion).

available." 42 U.S.C. § 1997e(a)(1) (1994).[8] The PLRA requirement eliminates the wide-ranging discretion embodied in the "appropriate and in the interests of justice" standard, and it requires exhaustion of remedies that may not be "plain, speedy, and effective." Similarly, the PLRA exhaustion requirement is more stringent than a judicially-fashioned exhaustion requirement, which also would have considered the speed, fairness, and effectiveness of the existing administrative remedy. See McCarthy v. Madigan, 503 U.S. at 147-149 (considering delay, effectiveness, and bias in determining whether to impose, absent a congressional directive, an exhaustion requirement in Bivens actions).

Accordingly, in enacting PLRA, Congress intended to narrow the very broad exceptions to the exhaustion requirement under prior law. But nothing in the language or structure of the PLRA suggests a congressional intent to apply the exhaustion requirement more stringently than other statutorily-imposed exhaustion requirements. Indeed, the language and structure of the PLRA provision demonstrate an intent that, consistent with this Court's construction of other statutory exhaustion requirements, only administrative remedies that can actually provide the requested relief are to be considered "available."

In sum, Congress did not intend to require prisoners to exhaust administrative remedies that could not provide the requested relief. It certainly did not clearly express such an intent. In the absence of a clear expression of congressional intent, this Court should not impose such a requirement.

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[8]The PLRA also eliminated the provision that exhaustion could not be required unless the Attorney General of the United States had certified, or the court had determined, that administrative remedies were in substantial compliance with minimum standards promulgated by the Attorney General, or the court had determined that the remedies were otherwise "fair and effective." 42 U.S.C. § 1997e(a)(2) (1994).

II. REQUIRING DAMAGE CLAIMANTS TO EXHAUST GRIEVANCE SYSTEMS THAT DO NOT PROVIDE DAMAGES POSES A GRAVE RISK THAT MERITORIOUS CLAIMS WILL BE LOST.

There are also sound policy reasons not to require exhaustion of administrative remedies that cannot provide the requested relief. Prison and jail grievance systems are designed primarily to solve ongoing problems and resolve current complaints.[9] They are usually not designed to pass judgment on past incidents, make findings of historical fact, resolve conflicting testimony, determine fault, and award monetary compensation. Perhaps for this reason, many prison grievance systems include procedural features that may make sense for prospective problem-solving, but constitute technical obstacles and traps for the unwary for a prisoner seeking monetary compensation for a specific past incident of harm. Requiring exhaustion makes little sense when it cannot provide the relief sought, therefore cannot resolve the controversy, and serves only to create a gratuitous risk that a meritorious claim may become barred by a prisoner's technical mistake. It also makes no sense to assume that Congress intended such a result, especially since this precise problem was delineated by this Court years ago, and Congress has indicated no intent to overturn or reject this Court's holding. See note 5, supra.

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[9]See Hawaii, at 1 (purposes of grievance system include "establishing a mechanism which will identify institutional problems and afford a means for corrective action"); Montana, at 1 (grievance policy is intended to "afford staff the opportunity to improve facility operations"). For ease of reference, grievance procedures are cited by the name of the state or locality where they are in effect. Complete citations for these procedures may be found in Appendix 1. These materials have been lodged with the Clerk.

In McCarthy v. Madigan, this Court held that a prisoner bringing a Bivens action seeking only money damages need not first exhaust the grievance procedure of the Federal Bureau of Prisons. The Court noted that the Bureau's grievance procedure "imposes short, successive filing deadlines that create a high risk of forfeiture of a claim for failure to comply,"503 U.S. 152, and observed that these deadlines "are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." Id. at 153. Focusing on prisoners seeking monetary compensation as a remedy, this Court understood that "[a]ll in all, these deadlines require a good deal of an inmate at the peril of forfeiting his claim for money damages." Id.[10]

Many prison grievance procedures today include filing deadlines far more onerous than those at issue in McCarthy. A prisoner filing a grievance that pertains to a discrete incident may be required to file within as little as three days of the incident, or have his grievance rejected as time-barred.[11] Thus, while other civil rights plaintiffs enjoy a statute of limitations of

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[10]The Court's analysis was not altered by the fact that these deadlines could be extended for "valid" reasons. "[T]he regulations do not elaborate upon what a 'valid' reason is. Moreover, it appears that prison officials–perhaps the very officials subject to suit–are charged with determining what is a 'valid' reason." 503 U.S. at 153.

[11]See, e.g., Tennessee, at 2 (7 calendar days); Utah, § 3.03 (7 calendar days); Kentucky, at 9, 11 (5 working days); Georgia, at 6 (5 calendar days); Metro Dade (Florida), at 2 (3 working days); Rhode Island, at 3 (3 days); City of New York, Inmate Grievance Form #7101-5 (3 days); Oklahoma, § IV.A. (must attempt "informal resolution" within 3 days).

one, two, or three years or more,[12] if this Court adopts the position of the court below, prisoners will face a de facto limitations period that is measured in days. Cf. Felder v. Casey, 487 U.S. 131, 139-40 (1988) (limitations period providing "only a truncated period of time within which to file suit" conflicts with the policies of § 1983).

These initial filing deadlines are compounded by deadlines as short as *one day* for appealing from an adverse decision, sometimes through several levels of appeal.[13] In some systems, it is simply unclear how much time a prisoner has to file a grievance or appeal. See, e.g., Virginia, at 7 (providing that a prisoner has 30 calendar days to file a grievance, "except ... where a more restrictive time frame has been established in Division Procedures"); Tennessee, at 2 (grievances must be filed within 7 calendar days, "with the exception of Title VI complaints," which must be filed within 180 days).

These short deadlines would be a substantial problem in any administrative remedy system. They are especially problematic in connection with the prison population, which is generally legally unsophisticated, poorly educated, and often functionally illiterate.[14]

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[12]See Wilson v. Garcia, 471 U.S. 261, 280 (1985) (federal court hearing § 1983 action is to apply personal injury statute of limitations of forum state).

[13]See, e.g., Mississippi, at 3 (appeal must be received within 5 days); Ohio, AR 5120-9-31(H)(8) (5 working days); Virginia, at 11 (5 days); Tennessee, at 2-3 (5 days); Colorado, at 3 (5 days); Georgia, at 8-9 (appeal must be received within 4 calendar days); Kentucky, at 11 (3 working days); Washington, FAC 110, 120 (2 working days); Metro Dade, at 4-5 (48 hours); City of New York, Inmate Grievance Form #7101-5 (1 day).

[14]The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest

This problem is particularly worrisome in light of the nature of many prisoner damage claims. The most serious such cases typically involve allegations of physical injury resulting from the use of force by staff, assaults by other prisoners occasioned by the deliberate indifference or complicity of staff, and deliberate indifference to serious medical needs. The realities of prison life militate against prisoners' ability to meet the short deadlines of grievance procedures in such cases. Prisoners involved in altercations, either with staff or with other prisoners, are generally placed immediately in segregation units pending disciplinary hearings, or in cases where prison staff accept that they have been victimized, in protective custody. See, e.g., Farmer v. Brennan, 511 U.S. 825, 830 (1994) (prisoner transferred to segregation after reporting assault by another prisoner); Hudson v. McMillian, 503 U.S. 1, 4 (1992) (prisoner moved to "administrative lockdown" after verbal confrontation with staff). Access to grievance rules, necessary forms, and grievance personnel whose advice or cooperation may be necessary is likely to be greatly delayed or restricted in such units.

Prisoners are also often transferred after violent or disruptive incidents, which may interfere with their ability to file a grievance, to file it at the right institution, or to appeal timely if they file at one prison and are then transferred to another. Prisoner-staff altercations by nature result in heightened tensions regardless of who was at fault, and in the initial days after such an incident, prisoners are likely to be fearful even of asking staff for necessary assistance in filing grievances, and the risk of staff retaliation to obstruct or divert grievances is very real.[15] In

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literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey xviii, 17-19 (1994).

[15]The staff response to the Attica Correctional Facility rebellion, which included massive extralegal retaliatory abuse

cases of altercations with serious injury or serious medical problems, prisoners may also be hospitalized and lack access to the grievance system, or may be too incapacitated to make use of it.[16] In such cases, a prisoner is unlikely to succeed in complying with a grievance filing deadline of three, five, or seven days.

But multiple, short, and sometimes unclear filing deadlines are only the tip of the iceberg. Many grievance systems, like that at issue in McCarthy, provide that a prisoner may not file a grievance unless he first attempts to resolve the issue informally. See, e.g., Kentucky, at 11 (requiring that the prisoner both attempt informal resolution before filing a grievance, and file the grievance within 5 working days of the incident grieved).[17] This requirement, in conjunction with short filing deadlines, allows staff either intentionally or inadvertently to prevent the prisoner from filing a grievance at all. For example, at Virginia's Wallens Ridge State Prison, the prisoner must attempt informal resolution by submitting a "Request for

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against prisoners, is the paradigm case. See Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); see also Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999). The same pattern is familiar in cases arising from smaller-scale prison disturbances or feared disturbances. See, e.g., Meriwether v. Coughlin, 879 F.2d 1037, 1047-48 (2d Cir. 1989); Bolin v. Black, 875 F.2d 1343, 1350 (8th Cir.), cert. denied, 493 U.S. 993 (1989).

[16]See Cruz v. Jordan, 80 F.Supp.2d 109, 123-24, 126 (S.D.N.Y. 1999), in which prison officials refused the court's request to allow the prisoner to file a late grievance, notwithstanding that the prisoner had been unconscious, in pain, or in the hospital during the 14-day period for filing.

[17]See also Virginia, at 7; Colorado, at 3; Texas, at 1; Ohio, Policy 203-01, § VI.F.

Services/Complaint" form "to the appropriate staff."[18] If the form is not submitted to "appropriate staff," it is returned to the prisoner. If the person receiving the form forwards it to another staff member, the prisoner must await a response from the latter. Prison staff have 15 days to respond "from the date that that [sic] the Complaint form is *received* by the department or staff person who is responsible for answering the Request for Services/Complaint form" (emphasis added). A prisoner is required to file the completed Request for Services/Complaint form with his grievance. WRSP, at 4-5.

In short, if a prisoner does not correctly guess who is the "appropriate staff," or if prison staff decide (innocently or otherwise) to forward the complaint to another staff person for response, or if a response is delayed for any other reason, the prisoner's 30-day period to file a grievance may run before he receives the required response to his informal complaint.[19]

This problem is compounded by the likelihood, discussed above, that after incidents of conflict with prison staff, prisoners will be fearful of approaching those same staff or their co-workers to "resolve informally" a claim that prison staff unlawfully abused them. For example, Minnesota requires that, as the first step in the grievance process, the prisoner "submit a written grievance to the staff who is directly responsible for the issue being grieved." Minnesota, at 2. Presumably this would require Petitioner to submit his grievance directly to the corrections officers he accuses of assaulting him, or risk forfeiting his damages claim for failure to comply with the grievance procedure.

There are many other barriers to exhausting a prison grievance system with respect to a claim for monetary damages.

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[18]Virginia's informal resolution process varies from institution to institution. Virginia, at 7.

[19]As noted above, in some unspecified cases, a Virginia prisoner has less than 30 days to file a grievance.

Grievances or appeals may be rejected for myriad reasons, such as filing at the wrong institution, "insufficient information,"[20] failure to attach the response from the level below, submitting copies rather than originals, "inappropriate/excessive attachments," or simply "inappropriate."[21] It is often unclear whether a timely filed grievance rejected for a technical defect may later be resubmitted, with the defect cured, if the filing deadline has run. See also Oklahoma, § VII.A., B. (allowing appeal only on limited grounds, and requiring payment of $2 for each appeal filed).

In some cases, the prison system may simply refuse to process the prisoner's grievance for reasons beyond his control. The Texas grievance form states that grievances seeking monetary damages will be returned unprocessed, thus making exhaustion impossible for a prisoner in Petitioner's situation. In the Bureau of Prisons, the practice apparently varies from prison to prison on this point. See Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000). In Colorado, grievances deemed to be of general interest are answered by posting the response in a common area. "Once such a grievance response has been published, no further grievances on the matter shall be processed in that facility for six (6) months, unless the underlying procedure or regulation is substantially changed." Colorado, at 3. See also Kentucky, at 3 (similarly providing that a grievance deemed identical to those filed by other prisoners will not be processed). Such policies may make good sense for the purpose of prospective problem-solving, but it makes no sense to relegate damage claimants to a system in which their grievances may be dismissed simply because they are shared by others.

Moreover, a prisoner who has suffered an injury for which he wishes to seek damages may be barred from filing a grievance because he is alleged to have engaged in "abuse" of

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[20]Virginia, Attachment 2, at 2.

[21]Texas, at 1.

the grievance system, a term that may be defined vaguely or not at all. See, e.g., Virginia, at 5 (access to grievance system may be limited for "excessive filings" or "habitual misuse," terms which are not defined). In Colorado, a prisoner who has filed "excessive grievances" (again, the term is not defined) may be restricted to one grievance per month. Colorado, at 2. In Utah, a prisoner who files a "frivolous" grievance may be entirely barred from using the grievance system for up to six months. Utah § 02.08.B.6.c.3. "Frivolous" grievances include those that a prisoner "knows or reasonably should know" are "without merit" or "irresponsible." Id., § 01.03. Oklahoma allows grievance restriction for up to *one year* for "abuse or misuse" of the grievance process, which includes "grievances about de minimis . . . issues" and "repetitive grievances by multiple inmates/offenders about the same issue" Oklahoma, § IX. Clearly, a prisoner who is barred from using the grievance system may be unable to file a timely grievance about an incident for which he seeks compensation.

In some systems, even prisoners who are not alleged to have abused the grievance system are severely limited in the number of grievances they can file. See, e.g., Tennessee, at 4 (prisoners are not permitted to have more than one grievance pending at the first level of review); Georgia, at 10 (prisoners may only have two non-emergency grievances pending at the institutional level).[22]

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[22]The Mississippi system creates a Catch-22 for prisoners wishing to grieve multiple incidents. On the one hand, a grievance will be rejected if "[t]he offender has requested a remedy for more than one incident." Mississippi, at 2. On the other hand, "[i]f an offender submits multiple requests, the first request will be accepted and handled. The others will be logged and set aside for handling at the Adjudicator's discretion. A maximum of ten (10) requests will be logged. Requests above that number will be returned to the offender and not filed." Id. at 5.

Transfer to another facility may also make it difficult or impossible to exhaust the grievance system. In Kentucky, if a prisoner is transferred while his grievance is pending, his only option is to "appoint another inmate to act in his stead with full power to appeal or not, as the second inmate may decide." If the grievant fails to do so, "the grievance shall be moot at all levels of appeal." Kentucky, at 12. Moreover, in some systems, the grievance system varies from institution to institution.[23] Thus, a recently transferred prisoner who understandably relies on his knowledge of the grievance process at his former institution may fail to comply with the procedures at his new location.

Finally, the requirements of the grievance process are often not explained clearly, or even accurately, to prisoners. At the outset, it is unlikely to occur to prisoners, uneducated and legally unsophisticated as many of them are, that a grievance process that does not provide damages is indeed an "available" remedy for their damage claims. Moreover, some grievance procedures are incomprehensible even to corrections officials. A 1999 survey by the Missouri Department of Corrections of state prison grievance systems found the Washington state procedure "very lengthy and very detailed. Certain issues are not always in one area in the procedure, making it difficult to find." Missouri Department of Corrections, Inmate Grievance Task Force Evaluation Report, September 1999, at 16.[24] The same report described the Hawaii procedure as "difficult to follow." Id. at 10. And sometimes the information provided to prisoners is affirmatively misleading. For example, the Ohio State Penitentiary Inmate Handbook, in its section titled "Grievance Procedures," does not advise the prisoner that there

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[23]See, e.g., Virginia, at 1, 6, 7; Ohio, Policy 203-01, § VI.F.1.

[24]The relevant portion of this report has been lodged with the Clerk.

is a time limit for filing grievances; it also makes no mention of the appeal process.[25]

These time limitations and other procedural and substantive obstacles do not pose the same problems for prisoners seeking a prospective change in the conditions of their confinement–for example, the failure of staff to provide necessary medical care, or unsafe conditions in the living unit. As long as the conditions persist, such grievances will never be time-barred; nor will any lawsuit. Filing a grievance that runs afoul of the grievance system's often arcane procedural requirements will not bar filing another after the first has been rejected. A transfer to another facility may moot the underlying problem; if not, the prisoner can file a grievance at the new location.

But for the prisoner like Petitioner who seeks monetary compensation for a discrete incident of harm in the past, prison and jail grievance procedures pose serious, unnecessary, and sometimes insurmountable barriers. The exhaustion requirement imposed by the court below poses a grave danger that the Petitioner's damage claim may be forever barred not because it lacks merit, but because he was unable to navigate the procedural intricacies of a grievance system that was unable to provide him with a remedy.

III. REQUIRING DAMAGE CLAIMANTS TO EXHAUST ADMINISTRATIVE GRIEVANCE SYSTEMS THAT DO NOT PROVIDE DAMAGES WILL NOT ADVANCE STATUTORY PURPOSES OR OTHER POLICY GOALS.

While requiring exhaustion of remedies that cannot provide damages will arbitrarily prevent the presentation of

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[25]Compare Ohio State Penitentiary Inmate Handbook, at 10, with Policy 203-01, § VI.D (setting forth filing deadlines), § VI.F.6 (appeal procedure).

meritorious claims, it will do little to further the asserted purposes of PLRA, or the policy goals that underlie the exhaustion doctrine. Those purposes were considered by the Third Circuit in Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000), on which the holding below is based. In Nyhuis, the court relied upon its view of the congressional purpose to reduce frivolous litigation by prisoners, and also upon "myriad policy considerations," for requiring damage claimants to exhaust remedies that do not provide damages. 204 F.3d at 73-77. But the stated congressional purpose is not realized or advanced by imposing such a broad exhaustion rule, and the policy justifications are variously exaggerated, unrealistic, or insubstantial–especially in cases such as this, alleging completed injurious acts by line officers rather than an ongoing course of conduct or an institutional policy. See Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 538 (7th Cir. 1999) ("It is possible to imagine cases in which the harm is done and no further administrative action could supply any remedy").

Broadly speaking, the policies cited in Nyhuis are those recognized by this Court in McCarthy v. Madigan as generally promoted by an administrative exhaustion requirement, namely "protecting administrative agency authority and promoting judicial efficiency." 503 U.S. at 145.[26] However, the McCarthy Court understood that neither of those purposes is usefully served by requiring prisoners seeking damages to exhaust grievance systems where damages could not be obtained in a grievance. Id. at 155-56. Moreover, nothing in the legislative

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[26]Nyhuis categorizes these polices as avoiding interruption of the administrative process, conserving scarce judicial resources, and improving the efficacy of the administrative process. 204 F.3d at 75.

history of the PLRA shows any congressional concern for the furtherance of these policies.[27]

The Nyhuis court noted the congressional purpose to reduce frivolous litigation, and said that "[e]xempting claims for monetary relief from the exhaustion requirement in § 1997e(a) would frustrate this purpose. It would enable prisoners, as they became aware of such an exemption, to evade the exhaustion requirement, merely by limiting their complaints to requests for money damages." 204 F.3d at 74. This argument rests on two unsupported assumptions. First, it assumes that prisoners will frame their lawsuits so as to avoid the exhaustion requirement rather than to seek the relief that they believe their complaints merit. Since filing suit solely for damages would not bring prisoners expedited relief, prisoners would have nothing to gain by such a strategy.[28] Moreover, what most prisoner litigants want is no different from what any other litigant with a personal injury claim wants, namely, just compensation for the injury– to be made whole.

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[27]Nyhuis analyzes policy considerations at length because in its view, "Congress seems to have had [them] in mind in enacting the PLRA." Nyhuis, 204 F.3d at 75. But this assertion is unsupported by any legislative history.

[28]Equally speculative is the notion that "[a] prisoner may use the threat of money damages as a bargaining chip to obtain relief that he really wants, and may then be satisfied when he gets that relief from the prison." 204 F.3d at 76, quoting Beeson v. Fishkill Correctional Facility, 28 F.Supp.2d 884, 895 (S.D.N.Y. 1998). Attributing this degree of Machiavellian skill to litigants who are usually uneducated, legally unsophisticated, and appearing pro se is unrealistic. Moreover, a damage claim large enough and certain enough of success to be effective as a "bargaining chip" is the least likely sort of claim to be abandoned based on some other action by prison officials.

Second, this argument assumes that prisoners can effectively manipulate their claims for relief to avoid exhaustion. But a case either is or isn't susceptible to injunctive relief, and most prisoner damage cases–exemplified by this one–are not. A prisoner who, as Mr. Booth alleges, has been beaten by staff generally does not have a claim for injunctive relief. See, e.g., Hollimon v. DeTella, 6 F.Supp.2d 968, 970 (N.D. Ill. 1998) (holding that prisoner lacked standing for injunctive relief because he did not allege it was likely he would be beaten again); see also City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (applying same rule to police encounters). The same rule is true of prisoners subjected to other sorts of completed injuries, such as a prisoner who wishes to challenge an injury suffered at one prison but who now has been transferred to a second facility. See, e.g., Johnson v. Boreani, 946 F.2d 67, 72-73 (8th Cir. 1989) (denying prisoner injunctive relief based on past staff conduct); see also Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (denying transferred prisoner injunctive relief even though the condition that caused the injury continued at the original facility).

Thus, cases in which prisoners drop viable injunctive claims to avoid exhaustion will necessarily be rare. Cases of such manipulation should be dismissed on their own facts, see, e.g., Barbara v. New York Stock Exchange, 99 F.3d 49, 57 (2d Cir. 1996), rather than by adopting an unnecessarily broad exhaustion rule that would require dismissal of meritorious cases.

Nyhuis makes the assumption, unsupported by legislative history, "that Congress intended to save courts from spending countless hours, educating themselves in every case, as to the vagaries of prison administrative processes, state or federal." 204 F.3d at 74. This concern is without any apparent basis. Federal courts routinely interpret state law both in diversity cases and pursuant to their supplemental jurisdiction, 28 U.S.C. § 1367, as well as in cases in which state law is challenged as unconstitutional and must be construed. In cases involving

administrative proceedings, federal courts frequently determine whether such procedures can provide requested relief. See § I, supra, at 7-8. This Court has no difficulty examining, understanding, and describing prison grievance procedures. See McCarthy v. Madigan, 503 U.S. at 142-43 (summarizing Federal BOP procedure); see also Nyhuis, 204 F.3d at 77 n.12 (same); Miller v. Tanner, 196 F.3d 1190, 1193 (11th Cir. 1999) (description of Georgia Department of Corrections grievance procedure). Amici are aware of no decision among the large body of PLRA exhaustion case law in which a court could not determine, or expressed doubts concerning its conclusion, whether the procedure did or did not provide for an award of damages.

In a similar vein, Nyhuis cites, as a policy justifying exhaustion, "conserving scarce judicial resources, since the complaining party may be successful in vindicating his rights in the administrative process and the courts may never have to intervene." 204 F.3d at 75. That prospect has little relevance here, where, by hypothesis, we deal with a completed act–the alleged beatings by staff–for which the only meaningful vindication is an award of damages that the grievance system does not provide.[29] Damage claims will simply come to court

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[29]Nyhuis stated that "'even if the complaining prisoner seeks only money damages, the prisoner may be successful in having the [prison] halt the infringing practice' or fashion some other remedy, such as returning personal property, reforming personal property policies, firing an abusive prison guard, or creating a better screening process for hiring such guards." 204 F.3d at 76 (citations omitted). For a prisoner like Mr. Booth, who complains of completed assaults, measures such as firing an abusive guard or improving hiring procedures, or any other change in policy, simply do not provide a remedy. See Perez v. Wisconsin Dept. of Correction, 182 F.3d at 538. For him, as for a victim of completed acts of police misconduct, it is "damages or nothing." Bivens v. Six Unknown Named Agents, 401 U.S.

after a period of useless delay–except for those cases that do not come back because they are now time-barred. Moreover, this Court has already rejected the proposition that, under a statutory exhaustion requirement, claimants must exhaust a procedure that does not provide the relief they seek because there is a chance they might settle for something else. See Clayton, 451 U.S. at 693 (declining to require "useless gesture" of exhaustion of a procedure that did not provide reinstatement).

Nyhuis states that where plaintiffs exhaust and then sue, "there is still much to be gained" because the administrative process "can serve to create a record for subsequent proceedings, it can be used to help focus and clarify poorly pled or confusing claims, and it forces the prison to justify or explain its internal procedures." 204 F.3d at 76. In fact, most prison grievance systems are not conducted "on the record" in any meaningful sense. This Court, in rejecting the notion that forcing a prisoner through the administrative grievance procedure would advance the interests of judicial economy and efficiency, understood that

> [n]o formal factfindings are made. The paperwork generated by the grievance process might assist a court somewhat in ascertaining the facts underlying a prisoner's claim more quickly than if it has only a prisoner's complaint to review. But the grievance procedure does not create a formal factual record of the type that can be relied on conclusively by a court for disposition of a prisoner's claim on the pleadings or at summary judgment without the aid of affidavits.

McCarthy v. Madigan, 503 U.S. at 155-56; see also Lynn S. Branham, The Prison Litigation Reform Act's Enigmatic

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388, 410 (1971) (Harlan, J., concurring).

Exhaustion Requirement: What It Means and What Congress, Courts, and Correctional Officials Can Learn From It, 86 Cornell L. Rev. 101, 134-35 (2000) (in press) (citing survey showing that most grievance systems do not make a written report in cases where the prisoner seeks relief the system does not provide).[30] Indeed, the Pennsylvania grievance procedure makes all proceedings in the grievance system "inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee," JA 51, thus barring any fact-finding role that might benefit later judicial proceedings.

Another reason cited for requiring exhaustion is "avoiding premature interruption of the administrative process and giving the agency a chance to discover and correct its own errors." Nyhuis, 204 F.3d at 75. This is largely inapplicable to prison disputes like this one, although it might be highly relevant to agency decisions subject to administrative review in the usual course of agency procedure, and later subject to judicial review on the administrative record. There, the progression through administrative process to court is integral to the entire statutory scheme. But this is not such a case. Any proceeding in federal court under § 1983 will be de novo, independent of prior administrative proceedings. Conversely, a decision awarding damages in Mr. Booth's § 1983 case will in no way interrupt any administrative process, reverse any completed administrative process, or preclude the agency from discovering and correcting its own errors as it chooses.

The last reason cited by the Third Circuit is the notion that a broad exhaustion rule, requiring prisoners to exhaust procedures incapable of providing proper relief, will effect improvements in the administrative scheme. See Nyhuis, 204 F.3d at 76-77. But as a matter of common sense, making grievance exhaustion universal, even for claims that cannot be resolved by the system, does not in any way "promote the

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[30]This article has been lodged with the Clerk.

efficacy of the administrative process." In fact it does the opposite; if prisoners have no choice but to use the procedure, there is no incentive for officials to expand the scope of relief available or to transform existing rudimentary procedures into something fairer and more helpful both to the prisoner and to the court in any subsequent litigation.

Finally, the policy concern that lurks, often unarticulated, behind the argument that damage claimants should be required to exhaust administrative procedures that cannot help them, is the view that the large volume of prisoner litigation,[31] primarily pro se, is mostly frivolous,[32] is an insupportable burden on the

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[31]In fact, any belief that prisoners have become progressively more litigious is contrary to fact. The growth in prisoner litigation is largely accounted for by the growth in the number of prisoners. From 1980 to 1995 (the last full year before the PLRA was enacted), the total jail and prison population in the United States increased from 501,886 to 1,577,842 (a 214% increase). The number of civil rights suits filed by state and federal prisoners in federal courts increased from 12,998 to 41,679 (a 221% increase). U.S. Dept. of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 1980-99, http://www.ojp.usdoj.gov/bjs/glance/corr2.txt; John Scalia, Prisoner Petitions in the Federal Courts, 1980-96 at 4, Table 3 (U.S. Dept. of Justice, Bureau of Justice Statistics, October, 1997). Focusing on state and local prisoners, one commentator found that the growth rate of the state prison population between 1980 and 1995 (237%) exceeded the rate of increase in the number of civil rights suits filed by state and local prisoners combined (227%). Branham, supra, 86 Cornell L. Rev. at 163 n. 257.

[32]A major survey of federal court prisoner cases, done a few years before the PLRA's enactment, found that only 19% of the cases sampled were dismissed as frivolous. U.S. Dept. of Justice, Bureau of Justice Statistics, Challenging the Conditions

federal courts,[33] and must be curbed. This view is exaggerated,

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of Prisons and Jails: A Report on Section 1983 Litigation at 20-21 and Table 5 (n.d.).

PLRA's legislative history contains reference to frivolous cases involving the wrong kind of peanut butter and the like, see, e.g., 141 Cong. Rec. S7524 (May 25, 1995) (statement of Senator Dole), but detached examination has suggested that such allegations are often no more than urban legends. See Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 Brooklyn L. Rev. 519, 520-22 (1996) (showing that descriptions by Attorneys General of allegedly frivolous cases were "highly misleading and, sometimes, simply false"); Jim Thomas, The "Reality" of Prisoner Litigation: Repackaging the Data, 15 N.E. Journal of Civil and Criminal Confinement 27, 29 (1989) (citing one attorney general's complaints about two atypical frivolous cases "repeated by the media to convey to the public an image of frivolousness"). In fact, the claims most frequently raised in prisoner § 1983 suits concern physical security (21%) and medical care (17%). Challenging the Conditions of Prisons and Jails, supra, at 17.

[33]Prisoner cases impose a considerably smaller burden than their numbers might suggest; the above-cited summary found that the vast majority of prisoner cases (74%) were dismissed by the court without adversary proceedings, and another 20% were dismissed on defendants' motion or by stipulation. Challenging the Conditions of Prisons and Jails, supra, at 19, Table 4. Only 3% required evidentiary hearings. Id. at 20-21 and Table 6. Similarly, the Federal Judicial Center has developed a case weighting system to measure "the different amounts of time judges require to resolve various types of civil and criminal actions." Administrative Office of the United States Courts, Judicial Business of the United States, 1999 Annual Report of the Director, at 29, http://www.uscourts.

as shown in the preceding footnotes. Moreover, Congress through the PLRA has enacted multiple, redundant measures that make it more difficult for prisoners than other litigants to file suit. The requirement that indigent prisoners proceeding in forma pauperis pay partial filing fees initially, and the entire filing fee and any award of costs eventually in installments, 28 U.S.C. § 1915(b), creates significant economic incentives not to litigate. In addition, the "three strikes" provision, 28 U.S.C. § 1915(g), which bars prisoners from using in forma pauperis procedures in most cases after they have had three dismissals as frivolous, malicious, or failing to state a claim, further raises the cost of filing non-meritorious litigation. In addition, new provisions that extend initial screening and sua sponte dismissal to cases (including fee-paid ones) that fail to state a claim or that seek damages against immune defendants, as well as to malicious and frivolous cases,[34] permit the early disposition of even more prisoner claims. Thus, "[p]risoners generally have everything to lose and nothing to gain by filing a frivolous

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gov/judbus1999/contents.html. The average case weight is approximately 1.0, id., but prisoner civil rights actions are assigned much lower weights: 0.28 for state prisoner cases and 0.48 for federal prisoner cases, indicating that they require substantially less of a court's time than most other types of cases. Federal Judicial Center, New Case Weights For Computing Each District's Weighted Filings Per Judgeship (undated report).

[34]See 28 U.S.C. § 1915(e)(2) (providing for such dismissals in all in forma pauperis cases); 28 U.S.C. § 1915A (providing for such dismissals, and requiring initial sua sponte screening for that purpose, in all cases in which prisoners seek relief against governmental agencies or personnel); 42 U.S.C. § 1997e(c)(1) (providing for such dismissals in any prisoner suit concerning prison conditions).

lawsuit for monetary relief."[35] In light of these provisions, it is unfair to read PLRA to bar from court substantial constitutional claims because the litigants failed to pursue an administrative remedy that could not have resolved those claims.

This case is about whether Mr. Booth, having failed to exhaust a system that could not resolve his claim, should be barred from court. And ultimately, when the courts refuse to hear particular types of claims, "we implicitly express a value judgment on the comparative importance of classes of legally protected interests." Bivens, 403 U.S. at 411 (Harlan, J., concurring). Mr. Booth's claim, alleging that prison staff "punched him in the face, threw cleaning material in his face, shoved him into a shelf, and tightened and twisted his handcuffs in such a manner as to injure him," App. Pet. Cert. 2a, is one that strikes at the heart of the values protected by the Bill of Rights. See Hudson v. McMillian, 503 U.S. 1, 9 (1992) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated"). Amici therefore respectfully submit that Mr. Booth should be allowed the chance to prove his claims and recover damages, notwithstanding his failure to complete the futile exhaustion of a remedy that could not have helped him.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[35]Branham, supra, 86 Cornell L. Rev. at 137.

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APPENDIX 1

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Case No. 99-1964

In The Supreme Court Of The United States

TIMOTHY BOOTH

Petitioner

v.

C. O. CHURNER, *et al.*

Respondents

BRIEF OF 50 STATES AND TERRITORIES AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1997(e), as amended by the Prison Litigation Reform Act, requires a prisoner to exhaust administrative remedies before bringing a federal action, where the prisoner seeks only monetary damages in the lawsuit and the administrative scheme does not provide for an award of such damages.

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S. Russo, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies*, 7 Seton Hall L. Rev. 366 (1976) 3

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STATEMENT OF AMICI INTEREST

The 50 *amici* States and Territories write because the Petitioner's analysis has the potential to further complicate one of the most difficult tasks consigned to state government—the operation of safe and well-ordered prisons. That analysis, if accepted, would drastically undercut the utility of inmate grievance systems, one of the key tools available to States in fulfilling that legal, and humane, duty. Moreover, it would do so at a time when States need all the help they can get to respond to an increasingly complex correctional environment.

State governments operate 1,328 prisons. Criminal Justice Institute, Inc., *The Corrections Yearbook-1999*, 66-67 (1999). The difficulties in doing so "are complex and intractable . . . requir[ing] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of" corrections professionals. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). "The relationship of state prisoners and the state officers who supervise their confinement is [] intimate," with "prisoners eating, sleeping, dressing, washing and working under the watchful eye of the state." *Prieser v. Rodriguez*, 411 U.S. 475, 492 (1973). State correctional agencies are responsible for a dazzling array of operations, being forced into the role of landlord, employer, tailor, doctor, banker, educator and cook. The potential for mistake, and conflict, is both pervasive and unavoidable, and corrections officials need every tool at their disposal to limit those problems.

Inmate grievance systems are one of the States' most important tools in prison management. As detailed below, those remedies serve as "early warning systems" for problems big or small; they highlight operational problems to be addressed before serious harm occurs. They also provide

far more efficient alternatives to litigation for resolving disputes, allowing disputing parties to focus on solutions rather than litigation tactics.

Given those functions, it is not surprising that the States have devoted significant effort to developing effective grievance systems. Almost every state has adopted some sort of system that allows prisoners to voice complaints generally. Others have supplemented those with more specific remedies addressing frequently litigated disputes such as staff misconduct, disciplinary matters, access to publications, and, as will become increasingly important following the enactment of the Religious Land Use and Institutionalized Persons Act of 2000, P.L.106-274, religious accommodations. *See, e.g.*, Ohio Admin. Code §§ 5120-9-02 and 03 (use of force); 5120-9-06 through 09 (disciplinary matters); 5120-9-19 (publications); ODRC policy 309-01 (religion). Further, the States make systematic efforts to review inmate grievances in order to discern areas where improvements are needed. *See, e.g.*, Ohio Admin. Code §§ 5120-9-30 (D)(5) through (7); 5120-9-31(I) and (L); *FY 2000 Annual Report of the Inmate Grievance Procedure* (Ohio Department of Rehabilitation and Correction 2000) (lodged with the Court); *Inmate Grievance Program Semiannual Report-January-June 2000* (New York Department of Correctional Services 2000) (lodged with the Court); *Offender Grievance Program Annual Report 1998* (Washington Department of Corrections 1999). Broad coverage has long been a key design principle for such systems, for, as the General Accounting Office recognized more than two decades ago, a successful grievance system "must be applicable to as broad a range of issues as possible." *Grievance Mechanisms in State Correctional Institutions and Large City Jails*, 2 (General Accounting Office, June 17, 1977).

Unfortunately, Petitioner's view will produce exactly the opposite result and undermine the States' very significant efforts in this area. It would allow prisoners to ignore administrative remedies whenever they seek damages that are not available. That reading of § 1997e(a) creates an exception that effectively abrogates the statute's general rule because almost all prisoners seek damages, and very few States have grievance systems that authorize damages for anything other than the loss of personal property. That approach would have palpable effects inside prison walls:

> *[I]f a prisoner may circumvent state agencies by bringing a section 1983 action, corrections personnel may not become aware of, and hence may not be able to rectify, administrative deficiencies until federal litigation is commenced* . . . Rather than have state policymakers determine the appropriate reform, the federal judiciary interposes its own judgment.
>
> * * *
>
> *Although this might benefit the individual prisoner bringing the action, problems affecting the entire prison population may remain unresolved.*

S. Russo, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies*, 7 Seton Hall L. Rev. 366, 392 and n.148 (1976) (emphasis added). Thus, the amici States submit this brief to protect the integrity of these early warning systems, for the benefit of the States and, ultimately, for the benefit of the inmates themselves.

SUMMARY OF ARGUMENT

Exhaustion here is a matter of Congressional intent, because when "Congress specifically mandates, exhaustion is required." *Coit Independent Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989). 42 U.S.C. § 1997e(a) broadly mandates that "[n]o action shall be brought with respect to prison conditions...until such administrative remedies as are available are exhausted," without regard to the type of relief sought. Petitioner Booth claims that prisoners should be allowed to bypass exhaustion if an administrative forum will not satisfy individual prisoners' demands for damages, and he claims that dictionary definitions of "available" and "remedy" support his view. But Petitioner's allegedly "plain" reading is not truly an objective one, as it is premised upon reading the terms solely from the inmate's *subjective* viewpoint. Petitioner thus converts the term "available" into "available in the way I like."

By fixating on the subjective desires of individual prisoners, Petitioner ignores the fact that intra-prison dispute resolution systems have been objectively shown to be "available" to help States detect and "remedy" deficiencies in their prisons, and that they do so without regard to the provision of damages. He also overlooks the fact that grievance systems are "available" to provide far more effective "remedies" than litigation for resolving the disputes that underlie prisoner lawsuits, and that they serve that function independent of damage awards. Thus, the plain language, when read from an overall viewpoint of the prisoner-plaintiff, the warden and staff, the inmate population, and any other stakeholders, shows that the Third Circuit's construction of § 1997e(a) fits easily within dictionary definitions and should be affirmed.

Almost as importantly, the Petitioner overlooks strong evidence in the legislative history of the Prison Litigation Reform Act ("PLRA") that Congress did not aim to expedite damage actions when it revised § 1997e(a). Congress was far more concerned with making "available" to the States "remedies" to limit the unreasonable operational constraints and costs that resulted from elevating prisoner-plaintiffs' often supra-constitutional desires over legitimate penological concerns. Indeed, other PLRA provisions expressly discouraged damages in prisoner cases, undercutting Petitioner's insistence that Congress intended to excuse exhaustion if such relief is not available. Those broader indicia of Congress's intent expose the fallacy of Petitioner's narrow focus on the subjective pecuniary interests of particular plaintiffs.

In short, the plain language of § 1997e(a) objectively mandates exhaustion, without reference to an individual prisoner's subjective desires, because grievance systems are "available" to "remedy" substandard prison conditions, and they do so more effectively than litigation, without regard to their ability to provide damages. The Third Circuit's thorough analysis "gave appropriate deference to Congress's power to prescribe the basic remedial scheme under which a claim may be heard in a federal court," *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), and it should be affirmed.

ARGUMENT

I. The PLRA's Plain Language Mandates Exhaustion of All Available Remedies, Regardless of the Remedy's "Adequacy" or a Prisoner's Subjective Preferences.

Unlike many other exhaustion requirements, which are often judge-made prudential doctrines, the requirement at issue here was dictated by Congress. Because Congress has mandated exhaustion, the requirement must be enforced. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 502 n.4 (1982); *Weinberger v. Salfi*, 422 U.S. 749, 766-767 (1975); *Coit Independence Joint Venture v. F.S.L.I.C.*, 489 U.S. 561, 580 (1989). And in this case, Congress not only adopted an exhaustion statute, but it went back and amended an existing one to make it both all-inclusive and compulsory.

The PLRA converted an optional-exhaustion provision into a mandatory one, and it took away a judicial inquiry into the "adequacy" of an administrative remedy. The previous version simply allowed courts to require exhaustion if "appropriate," and even then only if the remedy was "plain, speedy, and effective." Now, the plain text of § 1997e(a) does not expressly condition exhaustion on judicial review of a remedy's adequacy—*i.e.*, whether a remedy is "plain, speedy, and effective"—so it seems unlikely that Congress meant nevertheless to preserve such an inquiry, let alone loosen it so that exhaustion turns not on some objective adequacy, but on a prisoner's personal choice to name the type of relief he desires. Yet Petitioner's view would add both conditions, as his reading of the terms "remedy" and "available" would not only revive the expressly-deleted adequacy inquiry, which would be bad enough, but it goes one step further. His view opens the door to allowing a

prisoner to decide for himself what relief he would like, and to forgo an otherwise available remedy in favor of what Petitioner calls "the remedy the prisoner seeks." *See* Petitioner's Brief ("Pet. Br.") at 13.

That attempt to implant qualifications where none exist fails under its own terms. As experience gained over three decades has shown, intra-prison dispute resolution mechanisms are indeed "available" to "remedy" deficient prison conditions, and they do so more effectively than lawsuits, regardless of whether they provide damages.

A. Grievance Systems are "Available" to "Remedy" Deficient Prison Conditions Regardless of Whether They Satisfy The Grievant's Personal Demands.

All parties and amici agree, of course, that a prisoner must exhaust an "available remedy," as that is what the statute plainly says. We part ways on defining what constitutes a "remedy" and how to determine if one is "available."

The amici States submit that a remedy is available if it addresses the problem that a prisoner raises. It may not address it to his full satisfaction, or not to his satisfaction at all. In the unique context of prisons, however, a situation may be "addressed" in the broader sense—*e.g.*, conditions may be changed for the populace; a guard may be disciplined or fired—even if it admittedly gives little solace to the grieving inmate. Better still, many inmates who initially "demand" damages may decide that they are satisfied once they actually see operational changes in action. Congress knew that prison-conditions complaints reflect ongoing institutional concerns, and that every inmate's complaint may, if legitimate, be a symptom of a larger problem. It is in

this context that it required prisoners to invoke "available remedies," and it is in this context that the plain words make sense. In essence, the terms "available" and "remedy" should be defined objectively, not solely from the prisoner-plaintiff's subjective viewpoint.

By contrast, Petitioner's view of "availability," although couched in terms of "plain language," is built on a far narrower view of the problem needing to be addressed, one limited to the prisoner's short-term view of "what's in it for me?" Outside the prison walls, plaintiffs sometimes wish to "change the system," but most plaintiffs simply want what they want—for themselves. But prisons are different. Every challenge raised is, on some level, a challenge to the system, and calls out for an institutional response. To an individual prisoner, an allegation of excessive force by a guard may be a past event, calling for compensation only. But to the State, and to other inmates under that guard's supervision, there is still a problem to remedy: the guard, if guilty as charged, must be disciplined, re-trained, or fired. But at every turn, Petitioner's argument is explicitly or implicitly premised on ignoring that overarching concern in favor of his own particular pecuniary interests. To be sure, the prisoner is the complainant, and his view does matter. But restoring the broader context of other viewpoints, those of the individual claimant and other affected persons alike, shows why Congress's words must encompass the broader reading of "available remedy."

For example, Petitioner claims that dictionary definitions of "available" and "remedy" require the conclusion that remedies are not available if they do not provide the damages that a prisoner seeks. Pet. Br. at 15-16, citing *Webster's Third New International Dictionary* (3rd ed. 1993). *Webster's* defines a " remedy" as a "means to ... prevent or redress [ ] a wrong," *id.* at 1920, and "available"

as "having sufficient power or force to achieve an end ... capable of use for accomplishment of a purpose," *id.* at 150. But reading these definitions simply begs the question: what "wrong" must be righted; what "purpose" should be "accomplished?" If the purpose of grievance systems is writing checks to inmates, then Petitioner has a point. But his argument collapses if we simply recognize that the purpose to be accomplished, from both a prisoner's and the States' perspective, is achieving better prison conditions. This recognition is not a gloss on the text, but is simply a common-sense way of directly reading that text and one that is far more consistent with the overall thrust of the PLRA, as discussed below. Approached in this way, the better reading of the plain text is that a remedy is available when it addresses the problem in some way.

Even if both views were equally valid textual readings, Petitioner's subjective view must be rejected, as a prisoner's view of preferred remedies could almost always evade the exhaustion requirement. An inmate could evade exhaustion by demanding compensatory damages, punitive damages, or whatever else is not on the administrative menu. Even in the purely injunctive context, an inmate could insist on a particular policy change, even if challenged policy is set by statute, so that the administrative body cannot specifically "provide the remedy that the prisoner seeks," *see* Pet. Br. at 13, even if an equally serviceable remedy is undoubtedly available. Indeed, even if a grievance system pays money damages, a prisoner could conceivably insist that he does not want the State's money, but that he instead seeks to force a particular individual defendant to pay up. Such absurd results are not steps on a slippery slope, we submit, but are merely applications of a purely subjective "what does the inmate seek?" approach.

In contrast, the States' approach starts as well with the dictionary definition of available, and we then look to empirical evidence to see if prison grievance systems "hav[e] sufficient power to achieve an end" (*see* above at 8, citing Webster's)—with that end being resolution of prison problems. That empirical research, along with current practice, confirms that administrative remedies do achieve that end, even though very few provide for damages. Correctional managers use those systems as early warning devices "periodically reviewing the grievances to identify patterns, to anticipate problems *and to formulate policies and procedures that respond to them.*" S. Brakel, *Administrative Justice in the Penitentiary: A Report on Inmate Grievance Procedures*, 1982 Am. Bar Found. Res. J. 111, 129 (1982)(emphasis added).

Extensive literature on the topic is consistent in noting that such systems "have been found useful as a management tool" and that "by attentive monitoring of the complaint process, wardens and commissioners can discern patterns of inmate discontent that may warrant activities *to prevent development of more serious problems.*" G. Cole and J. Silbert, *Alternative Dispute-Resolution Mechanisms for Prisoner Grievances*, 9 Justice System Journal 306, 315 (1984) (emphasis added). *Accord*, Denenberg & Denenberg, *Prison Grievance Procedures*, Corrections Magazine, January/February 1975 at 34, 36, 41, 51 (citing examples in the federal, Maryland and California prison systems); *Managers Need Comprehensive Systems for Assessing Effectiveness and Operation of Inmate Grievance Systems* (General Accounting Office, October 17, 1977) 2-3 (citing examples from the federal and New York systems). Indeed, that vital impetus for self-correction was a primary reason that administrators initially implemented grievance systems. V. McArthur, *Inmate Grievance Mechanisms: A Survey of*

209 American Prisons, 38 Fed. Probation 41, 44 (December 1974).

A typical example is found in the most recent review of New York's grievance system. That review identified problems with law library and inmate payroll operations and provided valuable feedback on the efficacy of solutions to previously identified problems in the delivery of medical care, mail handling, visiting procedures and the observance of therapeutic diets. *Inmate Grievance Programs: Semiannual Report January-June 2000* (New York Department of Correctional Services 2000) 11, 13, 14, 15, 27. Those results are not atypical, but are consistent with both the earliest research on inmate grievance systems and responses to an informal inquiry made within the last sixty days. A 1975 study noted that inmate grievance systems resulted in changes to mail, library, transfer, grooming standards, medical care and property policies. Denenberg & Denenberg, *supra*, at 34, 36-37, 51, 61-62. Studies in 1976 and 1977 identified grievance-driven changes to correspondence, vehicle safety, telephone access and vocational training policies. A. Breed, *Instituting California's Ward Grievance Procedure: An Inside Perspective*, 10 Loyola (L.A.) L.R. 113, 118-120 (1976); *Managers Need Comprehensive Systems for Assessing the Effectiveness and Operation of Inmate Grievance Mechanisms* (General Accounting Office, October 17, 1977) 2-3.

Inquiries made contemporaneously with this brief have revealed that operational practices continue to be changed in response to prisoners' grievances. Ohio, for example, has most recently followed that pattern by, among other things, making medical and dental care more quickly available, responding favorably to prisoners' requests for more effective countermeasures against contraband, and

reducing the amount of time inmates must spend in "lockdown" status, all in response to prisoner grievances. *See* Appendix.

Grievance systems serve another purpose as well: to provide a means to enforce even-handed application of existing policies. Most States have developed system-wide policies intended to minimize tension between "staff on the front line" and "prisoners hostile to the authoritarian structure of the prison environment." *Sandin v. Conner*, 515 U.S. 472, 482 (1995). Deviation from those standards can result in increased tension that is often difficult for top management to detect in this age of multi-facility prison systems. Inmate grievance systems are a key way of detecting, and dealing with, such potentially inflammatory deviations, a way that is far more effective than litigation. *Compare FY 2000 Annual Report of the Inmate Grievance Procedure* (Ohio Department of Rehabilitation and Correction, 2000) 5 (22.76% of use of force/inappropriate supervision grievances resolved in favor of inmate); G. Cole, R. Hanson, and J. Silbert, *Alternative Dispute Resolution Mechanisms for Prisoner Grievances* (National Institution of Corrections, U. S. Dept. of Justice 1984) 34 (26% success rate for prisoners' complaints about staff misconduct) with R. Hanson and H. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* (Bureau of Justice Statistics, U. S. Dept. of Justice, 1995) 19, Table 4 (6% success rate in prisoner civil rights suits). Once again, that empirical research is consistent with operational experience. For example, New York has recently learned of, and corrected, deviations from existing policies through the monitoring of administrative complaints. *Inmate Grievance Program: Annual Report 1999*, (New York Dept. of Correctional Services, 1999) 22; *Inmate Grievance Programs: Semiannual Report January-June 2000*, *supra*, at 13.

In sum, inmate grievance systems are "available" to "remedy" deficiencies affecting many prisoners, regardless of whether they will satisfy any individual prisoner's desire for damages. Research and practical experience proves that they are effective "means to ... prevent or redress [ ] a wrong" and are "capable of use for accomplishment of" significant purposes," even if they do not provide damages to individual prisoner-plaintiffs.

B. Administrative Remedies Are "Available" to "Remedy" Disputes Far More Effectively Than Litigation.

Even for one complaining prisoner, a grievance system works to "accomplish" very "capabl[y]" another important "purpose," *Webster's Third New International Dictionary*, *supra*, at 150, namely, the efficient resolution of disputes. They are quite effective in that regard, with three decades of research consistently finding that between twenty to forty percent of inmate complaints are "remedied" in favor of inmate grievants. Denenberg & Denenberg, *Prisoner Grievance Procedures*, Corrections Magazine, January/February 1975 34, 36, 51; D. Dillingham and L. Singer, *Complaint Procedures in Prisons and Jails: An Examination of Recent Experiences* (National Institute of Corrections, U. S. Dept. of Justice, 1980) 34, Chart 2; G. Cole, R. Hansen, J. Silbert, *Alternative Dispute Resolutions for Prisoner Grievances* (National Institute of Corrections, U. S. Dept. of Justice, 1984) 34, 53; *Inmate Grievance Program: Annual Report, 1999*, *supra*, at 5; *FY 2000 Annual Report of the Inmate Grievance Procedure*, *supra*, at 5. This success is shown not only by the percentages, but also by the raw numbers. For example, the State of Washington resolved 12,812 complaints in favor of inmates in 1998, and New York's grievance system resolved 18,178 disputes in favor of prisoners in 1999, many of which

would have otherwise ended up in court. *Offender Grievance Program Annual Report 1998* (Washington Department of Corrections 1999) 9; *Inmate Grievance Programs: Annual Report 1999, supra*, at 2 and App. 4, p. 53. Indeed, the number of prisoner suits had significantly declined when resort to administrative remedies was required before the current version of § 1997e(a) was adopted, and that pattern accelerated after Congress further tightened § 1997e(a). Denenberg & Denenberg, *supra*, at 41; R. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U. Pub. L. Rev. 21 (1994); L. Mecham, *Judicial Business of the United States Courts: 1997 Report* 131-32, Table C-2A (Administrative Office of the United States Courts 1998) (noting 31% decline in prison cases after PLRA enacted).

Moreover, those administrative resolutions are reached far more efficiently than they would be through litigation. While an average single-issue prisoner case takes 268 days to resolve in federal district court, most grievance systems resolve them in far less time. *Inmate Grievance System: Annual Report 1999, supra*, 5 (72 days, including all appeals); *A Guide to Certification of Inmate Grievance Procedures Pursuant to the Civil Rights and Institutionalized Persons Act* (Federal Bureau of Prisons, U. S. Dept. of Justice, 1995) (maximum acceptable time, including appeals, is 180 days); R. Hanson and H. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* (Bureau of Justice Statistics, U. S. Dept. of Justice, 1995). They are also far more cost-effective. It takes an average of $1200 to $1500 to litigate a prisoner's grievance. But the average cost of resolving it administratively is $166. G. Cole and J. Silbert, *Alternative Dispute-Resolution Mechanisms for Prisoner Grievances*, 9 Justice System Journal 306, 308 n.1, and 315 (1981).

That efficiency benefits both inmates and the States. Administrative remedies save both time and money; they cost prisoners nothing, in contrast to mandatory filing fees in most state and all federal courts. *See, e.g.* 28 U.S.C. §§ 1915(a) and (b); Ohio Rev. Code § 2169.22. Further, while courts often lack both the resources and expertise to fully resolve legitimate complaints, grievance systems do in fact effect needed changes. Their conclusions are "more carefully obeyed than a court order because the Department could easily discipline subordinates who refuse to follow [their] directives. The federal court has no comparable enforcement tool." Denenberg & Denenberg, *supra*, at 40. *Accord*, J. Hepburn and J. Loue, *Resolution of Inmate Grievances as an Alternative to the Courts*, 35 Arbitration L. J. 11, 12 (1980).

Further, administrative dispute resolution relieves many operational burdens that inevitably result from litigation. At a minimum, lawsuits divert custody staff from normal duties to answer written discovery requests, to attend depositions and trials, and to transport prisoner-plaintiffs and their inmate witnesses to and from court. A. Champagne and K. Haas, *The Impact of* Johnson v. Avery *on Prison Administration*, 43 Tenn. L. Rev. 275, 291, Table 6, 293-295 (1976). More importantly, litigation leaves "staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems. The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems." G. Cole, R. Hanson, and J. Silbert, *supra*, at 8. Those costs are particularly galling because "many non-frivolous suits concern small monetary sums and the time devoted to them by [staff] is disproportionate to the amounts involved." *Id.* at 5.

Requiring exhaustion in all cases, regardless of the availability of damages, will not resolve all prisoner complaints. However, administrative remedies do resolve a significant portion of disputes, and they do so in a way that benefits individual prisoners and the system as a whole. Benefits accrue further when operational changes result from those resolutions, and those changes prevent other disputes from arising. Those results will occur without regard to the possibility of damage awards. Hence, those mechanisms provide a useful way to "prevent or obtain redress for a wrong" and have "sufficient power or force to achieve . . . end[s]." *Webster's Third New International Dictionary*, *supra*, at 1294, 150. Thus, those "remedies" are "available" for purposes of § 1997e(a), and they must be exhausted.

II. The Goals and Structure of the PLRA Show That Congress Did Not Intend To Expedite Damage Cases by Excusing Exhaustion.

Congressional intent is of "paramount interest" in any exhaustion inquiry. *McCarthy*, 503 U.S. at 144. Even when Congress has not specifically spoken, "appropriate deference to Congress's power to prescribe the basic procedural schemes under which a claim may be heard in a federal court requires fashioning exhaustion principles in a manner consistent with congressional intent and any applicable congressional scheme." *McCarthy*, 503 U.S. at 144. This Court has looked to legislative history and structure of relevant legislation to determine congressional intent in such a situation. *Id.*; *Patsy*, 457 U.S. at 501-502.

The history of the current § 1997e(a) strongly rebuts the Petitioner's premise that Congress sought to facilitate prisoners' damage suits by excusing exhaustion. To the contrary, Congress's primary focus was on providing the States with relief from the operational constraints and costs

that arose from unrestrained prisoner lawsuits. Indeed, other portions of that legislation provided very real disincentives to prisoner damage actions. Those indisputable facts demonstrate that the Petitioner's assumptions to the contrary are misplaced.

The current version of § 1997e(a) was enacted as part of the Prison Litigation Reform Act, P.L. No. 104-134 ("PLRA"). One of Congress's primary goals in enacting the PLRA was restoring the States' discretion to operate their prisons in accordance with penological imperatives rather than prisoners' desires. Congress was confronted with strong evidence that litigation was "hamstringing State and local officials in operating and managing their prison operations and managing their prison resources" and that "in many States, prisoners, their lawyers and unelected judges have replaced the people and their legislatures in controlling the character of prison life." *Prison Reform: Enhancing the Effectiveness of Incarceration*, Hearing before the Judiciary Committee of the United States Senate, 104th Cong., 2d. Sess. 26 (statement of William P. Barr), 5 (statement of Sen. Abraham)(1995); *see also id.* at 50 (statement Philadelphia District Attorney Lynne Abraham)(citing examples of "debates over the placement of flagpoles" and the "choice of art work at the prisons").

Congress was also concerned that a "nothing to lose attitude" among prisoners had led to an explosion of damage actions, costing the States unreasonable amounts of time and money. One witness explained that inmates had "nothing but time and if [they] 'hit[]' or win[] on only one in a hundred lawsuits, [they] feel[] it is worth it all." *Id.* at 111 (statement of O. Lane McCotter, Executive Director, Utah Dept. of Corrections). But when inmates played this lawsuit lottery, the State paid for the tickets, win or lose. *See id.*; 141 Cong. Rec. S 14417-14418 (daily ed., Sept. 27, 1995) (statement of

Sen. Dole) (an estimated $81,300,000 annually); 141 Cong. Rec. S 18296 (daily ed., Dec. 8 1995) (statement of Sen. Abraham). That was particularly aggravating because most claims involved relatively insignificant matters that could easily be resolved internally absent litigation.

Congress responded with legislation designed to "return [] control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners," and to provide relief from '[t]he huge costs imposed on state governments.'" 141 Cong. Rec. S 14627 (daily ed., Sept. 27, 1995) (statement of Sen. Hatch). Mandatory exhaustion of administrative remedies was part of that legislation and was intended to give corrections officials, rather than the judicial process, the first chance to correct problems in prison operations. A House sponsor noted that "[b]y returning these cases to [corrections officials] we will reduce the intrusion of the courts into prison administration." 141 Cong. Rec. H14105 (daily ed., Dec. 6, 1995)(statement of Rep. LoBiondo) Congress also recognized that most prisoner complaints, even where legitimate, were insubstantial enough that they could be resolved more effectively by administrative means. 141 Cong. Rec. S7527 (daily ed., May 25, 1995) (statement of Sen. Kyl). Against that background, Congress's mention of available remedies in § 1997e(a) could not have been meant to protect the pecuniary interests of prisoner-plaintiffs.

Indeed, Congress saw the difference between damages actions and other suits, but as several other PLRA provisions illustrate, it sought to curb damages claims, not fast-track them ahead of injunctive claims by uniquely exempting them from otherwise-mandatory exhaustion. Congress singled out damages claims when it structured 42 U.S.C. § 1997e(d)(2) in such a way as to impose a mathematical proportionality limitation on attorney fee

awards "whenever a money judgment is awarded that is not applicable in actions seeking only declaratory or injunctive relief." Congress also amended 42 U.S.C. § 1997e(e) to sharply limit damages for mental and emotional injury in constitutional cases. And in 28 U.S.C. § 1346(b)(1), Congress imposed similar limits on prisoner suits brought under the Federal Tort Claims Act. Finally, in uncodified PLRA §§ 807 and 808, Congress required that damage awards to prisoners be applied to outstanding restitution claims and that the victims of successful criminal claimants be notified before damages are paid. Taken together, those provisions illustrate that Congress did focus on damages claims—but it did so to limit such claims, not, as Petitioner would have it, to undercut these other structural limits by creating a unique damages-only exception to mandatory exhaustion.

CONCLUSION

The 50 *amici* States ask this Court to affirm the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

January 10, 2001

The Honorable Betty D. Montgomery
Attorney General of the State of Ohio
30 East Broad Street, 17th Floor
Columbus, OH 43215

Re: Administrative Remedies for Ohio Prisoners

Dear Madam Attorney General:

I am writing, as Chief Inspector of the Ohio Department of Rehabilitation and Correction ("ODRC"), in response to your inquiries about Ohio's inmate grievance system.

ODRC provides a grievance system for inmates to raise concerns about any aspect of institutional life. In addition, it provides a number of more specific dispute resolution mechanisms to address problems such as use of force, disciplinary sanctions, the exclusion of disruptive publications, and religious programming. See Ohio Admin. Code §§ 5120-9-02 and 03 (use of force); 5120-9-06-09 (disciplinary proceedings); 5120-9-19 (publications); 5120-9-31 (general grievance procedure); and ODRC Policy 309.01 (religious matters).

ODRC maintains and encourages use of its grievance system for several reasons. The most important is to learn of operational problems that need to be addressed. In addition to evaluations and individual grievances, ODRC conducts

regular monthly and annual analysis of inmate grievances to determine problem areas and takes action to correct problems so identified. Examples of recent changes that have resulted from review of inmate grievances include:

- Changes to procedures for storing and transporting inmate property to minimize damage and loss
- Liberalized transfer criteria to facilitate visitation
- Increased access to over-the-counter drugs and food items through prison commissaries
- Improved medical and dental care through greater emphasis on preventative medicine
- Revising meal schedules in order to eliminate delays and resulting lock-downs
- Changes to procedures to reduce the danger posed to other inmates by contraband
- Increased hours of access to libraries

It is important to note that a very significant portion of inmate grievances are resolved in favor of inmates—24.1 percent in the last fiscal year. Moreover, 89 percent of those resolutions resulted in changes to operational practices.

Another key function is to resolve the disputes that inevitably arise in the prison setting. ODRC resolved 1,957 formal grievances in favor of inmates in fiscal 2000. Moreover, that figure significantly understates the actual number of disputes resolved, as it does not include those resolved through the informal complaint phase of the grievance process. The cumulative result is the resolution of well over 2,000 disputes that otherwise would have likely resulted in litigation.

Because of the importance of those functions, ODRC has devoted significant resources to its inmate grievance system. It maintains full-time Inspectors of Institutional Services who resolve the majority of inmate grievances at each of the 34 separate institutions. In addition, I and my four Assistant Chief Inspectors devote almost all of our time to grievance appeals and other grievance-related matters. In short, ODRC has made a significant investment in the inmate grievance system because it believes that that system significantly contributes to its ability to maintain safe, secure, and humane prisons.

Thank you for your time and attention to this matter. Please don't hesitate to contact me should you have further questions regarding these matters.

Very truly yours,

Cheryl Jorgensen-Martinez, Esq.
Chief Inspector

CJM:mcj

Dec 14, 2000

(4)

No. 99-1964

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In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE BRENNAN CENTER FOR JUSTICE, ACTION ALLIANCE OF SENIOR CITIZENS, AND THE EDUCATION LAW CENTER, AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amicus the Brennan Center for Justice at New York University School of Law, founded to honor the legacy of the late U.S. Supreme Court Justice William J. Brennan, Jr., unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Brennan Center's mission is to develop and implement an innovative non-partisan agenda that promotes equality and human dignity while safeguarding human freedoms. To that end, the Brennan Center has created the Poverty Program which, among its many activities, works to eliminate unnecessary obstacles that prevent low income individuals and communities from obtaining access to the courts for the purpose of securing their legal rights. The Brennan Center objects to requirements of administrative exhaustion in circumstances where, as in this case, exhaustion is a futile exercise.

Amicus Action Alliance of Senior Citizens is a non-profit organization that educates, organizes, and empowers senior citizens on issues related to health care and economic security through a network of clubs, retiree groups, and residence councils in Southeastern Pennsylvania. Action Alliance particularly is interested in preserving and improving the Social Security programs because of their importance in a changing landscape of economic benefits relied upon by all citizens. Action Alliance has participated in litigation to challenge various unfair provisions of the Social Security Act.

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[1] This brief was authored in its entirety by counsel for the amici. No person or entity, other than the named amici and their counsel, made any monetary contribution to the preparation or submission of this brief. Letters of consent from all parties have been filed separately with the Clerk of the Court.

Amicus the Education Law Center ("ELC") is a non-profit advocacy organization, founded in 1975, that seeks to promote quality and equity in Pennsylvania's public education system. As part of its work, ELC has helped thousands of families to understand and assert their children's rights under the federal Individuals with Disabilities Education Act ("IDEA"), and also has engaged in systemic litigation and advocacy around special education issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central issue in this case is whether Congress intended to require exhaustion of administrative procedures under 42 U.S.C. § 1997e(a) without exception even when the remedy sought is unavailable. The lower court held that § 1997e(a) did not allow for any exceptions. However, this Court long has recognized exceptions to the doctrine of administrative exhaustion under a number of narrow circumstances, especially in situations like those presented here, in which the remedy sought by Mr. Booth was not available.

This Court repeatedly has held that exhaustion of administrative remedies can be waived in a narrowly circumscribed set of circumstances. This line of cases mitigates the potential unjust results of an absolute exhaustion requirement and recognizes the need for exceptions for futile and purposeless administrative reviews, reviews prolonged by unreasonable delays, or where the relief sought is unavailable.

There is an essential need for there to be exceptions to administrative exhaustion. The impoverished, the elderly, the disabled – indeed, under certain circumstances, probably every citizen who relies upon a government agency for benefits or services – must contend with extensive administrative delays

before resolution of a dispute. Often, the hardships experienced by many of this nation's citizens are exacerbated by agency determinations predicated on erroneous application of rules and regulations by overburdened decisionmakers who must make their determinations under less than ideal conditions. Although exhaustion of remedies may be tedious for many, it is particularly hard on those for whom exhaustion would be futile.

There is a grave risk – presented squarely by this case – that denying any exception to administrative exhaustion under § 1997e(a) will shift the weight of case law in an undesirable direction. Never in our knowledge has this Court found that exhaustion is necessary when the relief sought is unavailable. To so hold would be to tell those who are most in need of judicial protection that they will be denied access to the courts in the hour of their greatest vulnerability. For example, challenges based on laws that adjudicative officers are unable to enforce will be delayed for months or even years – cases alleging illegal discrimination, or violations of the Equal Protection Clause, or transgressions of state or federal laws guaranteeing civil rights will be subject to unnecessary delays while they are presented to tribunals incapable of offering relief. If the available administrative remedies cannot provide adequate relief, then it is an exercise in futility to require their exhaustion, and this Court consistently has held that exhaustion should not be required. *See Honig v. Doe*, 484 U.S. 305 (1988); *Weinberger v. Salfi*, 422 U.S. 748 (1975).

Several constituencies are intensely concerned about the unyielding application of exhaustion requirements even when administrative review would be futile because the relief sought is unavailable. Among these concerned constituencies are Social Security claimants, welfare recipients, children attending public schools, especially those who need protection under the Individu-

als with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, residents of public housing, unemployment compensation beneficiaries, and employees exposed to workplace discrimination. Many of these individuals encounter violations of their rights by administrative agencies and they are relying on this Court to ensure that they are only required to exhaust administrative remedies when their efforts will not be futile.

For instance, special education impacts millions of our nation's children who have disabilities. There are extensive protections provided by law to insure children a free appropriate public education. Although most of the disputes that arise are resolved through the administrative process, there are occasions when the families of these children rely on the courts to resolve disputes and where it would be futile to exhaust administrative remedies. This Court's decisions in other contexts suggest how any case should be resolved where the relief sought is outside the powers of the administrative agency's procedures. Certainly in the context of special education, this Court has recognized that requiring exhaustion when it is futile would only frustrate parents, delay the educational process for students, and waste valuable administrative and judicial resources. Similarly, the Court's decisions have created an exception to the exhaustion rule in Social Security challenges to the Act and agency regulations and procedures. It just makes good sense, and would be consistent with the Court's precedents, to extend the exception for futility to this case where the relief sought was not available through the prison procedures.

Thus, *Amici* submit this brief to place before the Court significant concerns about what upholding the lower court's decision in this case might mean to people of low income who must regularly contend with administrative actions adverse to their livelihoods. Should this Court affirm the interpretation of the language "such administrative remedies as are available" from

42 U.S.C. § 1997e(a) to require exhaustion in all cases without exception this will have a negative impact on low income individuals in other contexts. If the Court in this case retreats from its longstanding futility exception to administrative exhaustion requirements, then the procedures applicable to the protection of the rights of Social Security, welfare, special education, and other public benefit recipients will be imperiled

The Court of Appeals recognized that the Petitioner could not get the remedy he sought, but nevertheless held that § 1997e(a) brooks no exception to the exhaustion requirement. The court applied the standard from *Nyhuis v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000), and concluded that § 1997e(a) makes "exhaustion of all administrative remedies mandatory – whether or not they provide the inmate-plaintiff with the relief he says he desires." This standard leads to the inapposite result that because he failed to "'exhaust his available administrative remedies (*rather than those he believed would be effective*)' before filing his § 1983 claim," Mr. Booth's claim was dismissed properly by the district court. App. to Cert. Petition at 24a; *Booth v. Churner*, 206 F.3d 289, 300 (3d Cir. 2000) (quoting *Nyhuis*, 204 F.3d at 78 (emphasis added)). Should the Court uphold this misapplication of the plain meaning of § 1997e(a)'s "such administrative remedies as are available" language, and thus vitiate the well-established exception to administrative exhaustion when the relief sought is unavailable, then the availability of a waiver for futility will be on questionable ground for all who appear before administrative agencies.

ARGUMENT

A DECISION TO REQUIRE PRISONERS TO EXHAUST ADMINISTRATIVE REMEDIES WOULD BE CONTRARY TO EXISTING PRECEDENT, WHICH RECOGNIZES THE VALUE OF JUDICIAL DISCRETION IN WAIVING EXHAUSTION IN APPROPRIATE CASES

I. Courts Must Have the Power to Waive Exhaustion in Order to Further the Goals of an Efficient Judiciary and to Protect Meritorious Claims That May Otherwise Go Without Redress

The Court long has recognized that exhaustion generally refers to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and *obtain a remedy* if the decision is found to be unlawful or otherwise inappropriate." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (emphasis added). In *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976), this Court announced the "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injures to be suffered." This principle mitigates against exhaustion requirements that refuse to recognize an exception where administrative review would be futile, and it counsels especially that exhaustion should be excused where the remedies sought are not available through the ordinary administrative procedures.

Notwithstanding the legitimate purposes exhaustion serves, courts and legislatures traditionally have recognized narrow but important exceptions to the general rule requiring exhaustion. A substantial body of this Court's prior decisions has upheld waiver

of administrative exhaustion under limited circumstances where sound prudential and equitable principles compel it, and this Court consistently has held that "[a]dministrative remedies that are inadequate need not be exhausted." *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989).

In *Weinberger v. Salfi*, 422 U.S. 748, 766 (1975), the Court held that where administrative remedies are beyond the competence of the decisionmaker, namely, the constitutionality of a statutory provision that limited widow's benefits to those who had been married for at least nine months, it would "be futile and wasteful" to exhaust. The Court reached this conclusion notwithstanding the strong language requiring exhaustion contained in the Social Security Act. *Id.* at 757, 766 (noting that statutory language was more than simply a codified requirement of administrative exhaustion). The Court noted that circumstances justify waiving exhaustion 1) when it is futile to complete the administrative review process; 2) when challenges to agency policies and procedures involve illegal practices or violations of another federal or state law (e.g., in § 1983 claims); and 3) when administrative decisionmakers are not empowered to grant relief (e.g., challenges to the constitutionality of agency provisions, to curtail ongoing acts of discrimination, requesting money damages that the agency cannot accommodate, and other such issues where administrative review would not provide the relief sought). Absent either the adequate review procedures or the appropriate remedies, requiring administrative exhaustion would be an exercise in futility and this Court never has found exhaustion justifiable under such circumstances. *See id.* at 766.

Even where Congress specifically mandates exhaustion, there are sound reasons for a limited discretion to waive exhaustion. In *Salfi*, 422 U.S. at 766-67, the Court found that it is "inconsistent with the congressional scheme" of the Social Security Act to

require exhaustion of administrative review procedures where it is futile to exhaust, or is merely to satisfy the prerequisites for judicial review. In *Mathews v. Eldridge*, 424 U.S. at 331 n.11, the Court counseled that "the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." And in *Honig v. Doe*, 484 U.S. 305, 326-27 (1988), the Court held that exhaustion can be waived for claims brought under the prior version of the IDEA when it is futile to exhaust or where the remedies available are inadequate. Therefore, if the administrative procedures are incapable of providing the remedy sought, or are incapable of addressing the issues presented, then this Court never has required exhaustion. Denying Mr Booth's plea for waiver of exhaustion here would disturb this Court's long-established principle that futile administrative procedures need not be pursued and would not further the goals of an efficient judiciary.

A. Courts Must Retain An Exception to Exhaustion Where Administrative Procedures Cannot Provide the Relief Sought

The Court in *Salfi*, and its progeny, has waived statutory exhaustion requirements for constitutional challenges, in other circumstances where important issues are at stake that are beyond the capacity of the administrative procedures to resolve, for challenges to agency patterns and practices that may be illegal, and most particularly where the relief sought is not available as an administrative remedy. Based on the plain meaning of the language of 42 U.S.C. § 1997e(a), "such administrative remedies as are available," exhaustion should not be required because the remedy sought by Mr. Booth was not an available administrative remedy. Should the Court reject the view that the statute

requires waiver, then the Court should consider whether a limited waiver exception is permitted by the statutory language.

Because the prison procedures did not provide for monetary administrative remedies, exhaustion here would have been futile and this should weigh heavily in favor of waiver. This Court never has required exhaustion under circumstances where doing so would only promote a futile effort by the aggrieved party, or would result in a meaningless but inexorable outcome. *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (exhaustion not required when the administrative agency has "no power to decree" the relief sought); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) ("this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise"); *Honig*, 484 U.S. at 326-327 (parties "may bypass the administrative process where exhaustion would be futile or inadequate"). *See also McNary v. Haitian Refugee Center,* 498 U.S. 479, 496-97 (1991) (holding that an alien could bring a due process challenge to INS amnesty determination procedures because the statute did not evince intent to preclude pattern and practices challenges, and without waiving the exhaustion requirements there would be no means to obtain meaningful judicial review).

Many of this nation's neediest citizens rely for their livelihood on public agencies which often have complicated application procedures, periodic reviews of ongoing eligibility for benefits, and confusing requirements about reporting changes in circumstances. Certainly, the decisions of this Court suggest that these agencies occasionally violate the law in administering their programs. For many people, the administrative procedures associated with maintaining their income, or the very basic necessities of life, are so confounding that they often miss filing deadlines, or appointments, or phone contacts which an agency

might require for ongoing eligibility. Although due process rights are applicable under some circumstances, asserting these rights invokes other cumbersome requirements that for many impoverished, or elderly, or disabled individuals make it problematic even to recognize their rights, let alone enforce them.

Even where they are able to assert their due process rights, for a large number of people the administrative procedures become more daunting still because of disabilities or other impediments to their full participation in the review process. Accompanying the often baffling requirements for obtaining administrative review are sometimes very lengthy delays in reaching a resolution, and frequently the remedies are incommensurate with the original deprivation of benefits. The obstacles can seem insuperable. Furthermore, while awaiting administrative review of adverse determinations about welfare, food stamps, Social Security, special education, or other public benefits, it is not uncommon for additional difficulties to arise that require involvement by even more agencies and more administrative review procedures, such as in grievances with utility companies, creditors, and landlords. Finally, when a plaintiff who has been deprived of much needed benefits relies on the courts to balance the competing interests over whether to waive exhaustion, it often is the case that the agencies have articulate advocates arguing against them. The impoverished, the elderly, the disabled, and the politically unpopular have a hard time making their legitimate grievances heard. Therefore, when this nation's most vulnerable people seek redress from the courts, they rely upon the judiciary for a just and speedy resolution of their claims. While hundreds and thousands of administrative claims are adjudicated every day, there is a continued role for the judiciary to play in defending minority rights and affording these minorities an opportunity to present their claims in a timely manner without exhausting patently futile avenues of redress.

The history of waiver of exhaustion jurisprudence counsels that this Court has been appropriately reluctant to ascribe to Congress an antipathy toward a reasonable waiver of exhaustion under some circumstances. Congress, on the other hand, has acquiesced through its silence to this Court's approach to this recurring issue. When it is possible for a claimant to get the relief sought, then the courts may require exhaustion; when there is no potential for the claimant to get the relief sought, then requiring exhaustion is illogical and inconsistent with this Court's long-standing and sound approach.

It would be illogical to require exhaustion in this case because even after exhausting the available administrative remedies, not having gotten the relief he sought, Mr. Booth will be compelled to call on the courts again for relief. To require this kind of futile exhaustion does not fulfill any legitimate purpose; it only postpones the inevitable and wastes precious time and resources for both the administrative agency and Mr. Booth. Where it is futile for a plaintiff to exhaust administrative remedies, this Court never has required exhaustion of administrative remedies and the Court ought not in this case to start requiring futile administrative exhaustion.

B. Courts Must Retain An Exception to Exhaustion Where An Agency Applies Its Rules Inappropriately or Illegally

In *Heckler v. Ringer*, 466 U.S. 602, 618 (1984), the Court held that "in certain special cases, deference to the [agency's] conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." And in *Bowen v. City of New York*, 476 U.S. 467, 485 (1986), the Court held that exhausting an illegal administrative review scheme would be futile and therefore excused exhaustion because under such circum-

stances there is "nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise."

In both Social Security Act claims and those arising under the IDEA, there are elaborate administrative procedures in place that primarily favor the respective agencies involved. For example, as a prerequisite to seeking judicial review of an adverse determination, Social Security claimants must cope with several layers of administrative procedures; only at the third level, the administrative hearing, do they participate personally. Often, the adverse determinations made by the agencies are incorrect or show a disregard for the rules and the agency's own policies. Even in a normal Social Security case, the administrative process may take several years, during which the procedures themselves become increasingly sophisticated. Under these conditions, claimants often abandon otherwise meritorious claims because of frustration over their inability to cope with the apparent hegemony of the agency's authority. It would be unfair for claimants in these situations to be unduly informed by the courts that they will not be excused from exhausting administrative procedures that in the end will not provide them with adequate relief.

The Court repeatedly has instructed the lower courts to be "especially sensitive to this kind of harm where the [agency] seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place." *City of New York*, 476 U.S. at 484. Furthermore, where exhaustion is futile, the Court has often found that the agency's action constitutes a waiver of the requirement of exhaustion. *Mathews v. Diaz*, 426 U.S. 67, 75-77 (1976); *Eldridge*, 424 U.S. at 328, 330; *Salfi*, 422 U.S. at 763-65.

C. Courts Must Retain An Exception to Exhaustion Where Issues Are at Stake That Are Beyond the Power of the Adjudicator to Resolve

In *Salfi*, 422 U.S. at 765-66, the Court recognized circumstances where "further exhaustion would not merely be futile ... but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." In this case, it would have been futile for Mr. Booth to exhaust administrative remedies because the relief sought was not available through the prison's administrative procedures. Moreover, since the prison procedures did not permit money damages, requiring exhaustion in this case would clearly be a "commitment of administrative resources unsupported" by any interest because it was beyond the power of the prison's administrative procedures to provide the remedy sought by Mr. Booth.

Similarly, in *Califano v. Sanders*, 430 U.S. 99, 109 (1977), the Court stated that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.... [W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence (citations omitted)." Where a claimant raises a colorable constitutional claim, the Court has excused the failure to exhaust administrative review under the Social Security Act, 42 U.S.C. § 405(g). In *Eldridge*, 424 U.S. at 331, the Court held that 42 U.S.C. § 405(g)'s exhaustion requirements could be waived before a final decision on Social Security disability benefits because exhaustion requirements did not bar federal jurisdiction over a collateral due process challenge. In *Heckler v. Ringer*, 466 U.S. 602, 618 (1984), the Court

upheld jurisdiction over claims considered collateral to the statutory review provisions and beyond the agency's expertise because precluding such claims would foreclose meaningful judicial review. *See also Traynor v. Turnage*, 485 U.S. 535, 544-45 (1988) (statutory prohibition of judicial review of Veterans Administration determinations did not preclude review of agency policy alleged to be in violation of the Rehabilitation Act). In short, the Court consistently has recognized that exception to waiver should apply whenever the available administrative remedies cannot adequately address the issues at stake because they are beyond the power of the agency to resolve. So too, here, where the agency had no power to grant monetary relief, the exhaustion requirement should have been waived for the money damages claim.

II. Requiring Exhaustion in This Case Where the Relief Sought Is Not Available Will Create Inconsistencies in This Court's Waiver of Exhaustion Jurisprudence

Most recently, in *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000), the Court re-affirmed the longstanding principle that "[d]octrines of 'ripeness' and 'exhaustion' contain exceptions ... which exceptions permit early review when ... exhaustion would prove 'futile.'" *Id.* at 22-23 (citations omitted). Clearly, in several different contexts this Court has recognized that where exhaustion is futile, where it cannot provide the remedy sought, where there are systemic problems within the administrative process that cannot be rectified by the system itself, where there are violations of law, or where exhaustion would ultimately only be postponing an inevitable return to court for the plaintiff, then none of the purposes of exhaustion is satisfied and courts rightly and prudently should excuse the exhaustion requirement. Especially where the remedy sought is not available, as is the case here, this Court should recognize an

exception for futility and not require exhaustion of administrative remedies under 42 U.S.C. § 1997e(a).

If the purposes of exhaustion are not satisfied, waiver should be considered under the limited circumstances already cognized by this Court. The Court's discretion should balance the determination of which priorities should prevail under the facts of a particular case. Here, the Court must determine whether it is the availability of administrative procedures or the availability of appropriate remedies that is paramount and comports with congressional intent. If the purpose of exhaustion of the administrative remedies is the potential for a claimant to obtain adequate relief without judicial intervention, then the Court should read statutes that require exhaustion as applying only when the relief is available through the administrative procedures.

To require exhaustion would be contrary to this Court's longstanding principle that judicial discretion requires having the capacity to determine whether waiver of administrative remedies should be allowed under some limited circumstances, especially where the relief sought is not available to a plaintiff. To be consistent with this Court's past waiver of exhaustion jurisprudence, this principle should apply regardless of whether the plaintiff is a prisoner or a Social Security claimant or a child protected under the IDEA. Denying Mr. Booth's plea for waiver of exhaustion where the remedy he sought was not available may have an adverse effect on this Court's well-reasoned exceptions to waiver of administrative remedies in other contexts where statutory exhaustion requirements apply.

III. The Court Waives Administrative Exhaustion in Social Security Claims When Exhaustion Would Be Futile, and Similar Equitable and Prudential Judicial Principles Commend the Court to Extend the Exception to 42 U.S.C. § 1997e(a) Where Exhaustion Is Futile Because the Relief Sought Is Not Available

If the Court decides that the plain meaning of the language "such administrative remedies as are available" from 42 U.S.C. § 1997e(a) does not provide an exception where a remedy is not available, then the exceptions to exhaustion provided by this Court in other contexts may be jeopardized and may lead to inconsistencies in the application of waiver permitted in Social Security cases. *See City of New York,* 4765 U.S. at 483 (recognizing futility exception)*; Eldridge*, 424 U.S. at 328; *Salfi*, 422 U.S. at 763-67. If the Court requires prisoners covered by § 1997e(a) to exhaust administrative remedies where the relief sought is not available, then it is possible that by extension many disabled or elderly recipients of benefits under the Social Security Act may lose this Court's well-considered exceptions to exhaustion in the context of their Social Security claims.

A. The Court Should Apply the Futility Exception to This Case Because the Agency Has No Power To Provide the Remedy Sought

Because the core of any exception to the final decision exhaustion requirement under 42 U.S.C. § 405(g) implicates the determination of the relief or remedies that are available, this Court's interpretation of the language from 42 U.S.C. § 1997e(a) about "such remedies as are available" could have a profound impact on how other courts will interpret the Court's well-reasoned and carefully crafted exceptions to the final decision

prerequisites to judicial review in Social Security claims. A claimant who seeks to challenge any "initial determination"[2] by the Commissioner of the Social Security Administration must exhaust several stages of administrative review prior to seeking judicial review of the challenged decision.[3] The Social Security Act, 42 U.S.C. § 401 *et seq.*, provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, may obtain a review of such decision by a civil action" in federal district court. 42 U.S.C. § 405(g). The Act does not specify when a decision becomes the "final decision of the Commissioner." *See Salfi*, 422 U.S. at 766. *See generally Bowen v. Yuckert*, 482 U.S. 137, 142 (1987) (describing administrative review process for Social Security claims). The Court has held that "the exhaustion requirement of 405(g) consists of a nonwaivable requirement that a 'claim for benefits shall have been presented to the Secretary,' and a waivable requirement that the administrative remedies prescribed by the [Commissioner] be pursued fully by the claimant." *Ringer*, 466 U.S. at 617 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)).

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[2] "Initial determination" is defined as a decision about eligibility for benefits "or about any other matter ... that gives ... a right to further review." 20 C.F.R. §§ 404.900(a)(1), 416.1400(a)(1).

[3] Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, provides for the payment of monthly benefits to disabled persons who have contributed to the program's insurance fund. Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, provides for the payment of Supplemental Security Income ("SSI") benefits to low income persons who are aged, blind, or disabled.

In *Bowen v. City of New York*, 476 U.S. 467 (1986), the Court held that challenges to the procedures applied by the Social Security Administration could be sustained without administrative exhaustion under some very limited circumstances. The "final decision" requirement for exhaustion may be waived "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Id.* at 483 (quoting *Mathews v. Eldridge*, 424 U.S. at 330). Courts generally consider three factors in determining whether waiver of the exhaustion requirement is appropriate in these cases: 1) whether the issue raised is collateral to the substantive claim; 2) whether irreparable harm is likely absent the waiver; and 3) whether the underlying purpose of exhaustion is meaningful or whether requiring exhaustion would be futile for the claimant. *Id.* at 483-85. Of these three factors, the exception for futility is most germane Booth's claim here.

The futility exception to exhaustion under § 405(g) requires a determination whether the policies underlying the exhaustion requirement would be served by exhausting the administrative review or whether exhaustion would be futile. *City of New York*, 476 U.S. at 484; *Salfi*, 422 U.S. at 765. None of the underlying purposes of exhaustion is justified when a plaintiff challenges an agency policy as inconsistent with the regulations or the statute. System-wide policies that are inconsistent with the law can not be remedied through administrative review, since policies do not depend on the specific facts of any particular case, nor are hearing officers empowered to invalidate agency rules and regulations. If the agency applies rules and regulations which deprive a claimant of a fair assessment of his or her eligibility, then exhausting the administrative remedies will be futile. Thus, where exhaustion is futile, "there [is] nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *City of New York*, 476 U.S. at 485.

The Court has provided a well-considered exception to the "final decision" prerequisite for judicial review under 42 U.S.C. § 405(g). This exception has facilitated the judicial discretion to determine when equitable and prudential principles call for exhaustion and when they compel waiver. Within certain very limited circumstances, the Court has waived exhaustion when there is a showing that exhaustion would be futile. Because of the exception to the exhaustion requirements, the lower courts have retained the discretion to determine when a plaintiff's meritorious claim would only languish interminably in exhausting a purposeless administrative review. The Court in this case should not disturb these longstanding precedents, and their consistent application in other courts, by refusing to recognize a futility exception for prisoners covered by 42 U.S.C. § 1997e(a) where the administrative remedies sought are not available.

IV. This Court Waives Administrative Exhaustion in Claims Under the Individuals with Disabilities Education Act When Exhaustion Would Be Futile, and Similar Equitable and Prudential Principles Commend the Court to Extend the Exception to 42 U.S.C. § 1997e(a) Where Exhaustion Is Futile Because the Relief Sought Is Not Available

For claims brought under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, ("IDEA"), the Court has recognized a futility exception, just as it has in other substantive areas for many years; it makes sense to extend this approach to the present case. Should the Court decide, however, that the plain meaning of "such administrative remedies as are available" under 42 U.S.C. § 1997e(a) does not provide an exception where administrative review would be futile, then it is possible that the exception to exhaustion provided by this Court in its application

of jurisdiction under the IDEA will be in conflict with the Court's decision in the present case.

A. The Court Should Apply the Futility Exception to This Case Because the Agency Has No Power To Provide the Remedy Sought

If the Court were to interpret the language from 42 U.S.C. § 1997e(a) about "such remedies as are available" as denying all exceptions to exhaustion, this could impact how other courts will interpret the Court's well-reasoned exception to exhaustion of administrative remedies under the IDEA. Should the Court decide that exhaustion without exception is required in this case, then the potential increases for inconsistent application of the IDEA's longstanding futility exception.

In *Honig v. Doe*, 484 U.S. 305 (1988), the Court excused exhaustion for claims brought under the prior version of the IDEA[4] where it is futile to exhaust or where the available remedies are inadequate. *Id.* at 326-27 ("parents may bypass the administrative process where exhaustion would be futile or inadequate"). In the context of IDEA claims, exhaustion is futile or inadequate where the agency violates the law or where the harm cannot be addressed through the ordinary administrative procedures. *See, e.g., Urban v. Jefferson County Sch. Dist.*, 89 F.3d 720, 724 (10th Cir. 1996) (waiver permitted where adminis-

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[4] The statute has been amended several times, including Pub. L. No. 101-471, 104 Stat. 1141 (1990) (renaming "Education of the Handicapped Act" as the "Individuals with Disabilities Education Act"), more recently in Pub. L. No. 105-17, 111 Stat. 37, 88 (1997), and again in Pub. L. No. 106-25, 113 Stat. 49 (1999). S*ee Heldman v. Sobol,* 962 F.2d 148, 150 n.1 (2nd Cir. 1992) (discussing legislative history of IDEA).

trative remedies would be futile, fail to provide relief, or the agency has adopted a policy or practice that is contrary to the law); *W.B. v. Matula,* 67 F.3d 484, 496 (3d Cir. 1995) (finding it "futile, perhaps even impossible, for plaintiffs to exhaust" where relief sought is unavailable under IDEA); *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 190 (1st Cir. 1993) (exhaustion "may not be required where the pursuit of administrative remedies would be futile or inadequate; waste resources, and work severe or irreparable harm on the litigant; or when the issues raised involve purely legal questions"). Courts also have excused exhaustion where further delay poses a risk or danger to the child plaintiff. *See Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994).

As the Court recognized in *Burlington School Committee v. Massachusetts Dept. of Education,* 471 U.S. 359, 370 (1985), the IDEA's "review process is ponderous. A final judicial decision on the merits of an IEP [Individualized Educational Program] will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." This Court prudently has recognized that parents should not be required under all circumstances to exhaust IDEA administrative procedures, especially where the relief they seek ultimately is not available except through the courts. It is logical to extend the same principles to this case and waive exhaustion of administrative remedies where the relief sought was not available through the prison administrative procedures.

Regardless of the context of the claim, if none of the purposes of exhaustion is satisfied, then waiver should be allowed under the limited circumstances already cognized by this Court. The

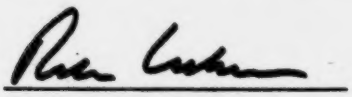
Court has recognized that where exhaustion is futile, where it cannot provide the remedy sought, or where exhaustion would ultimately only postpone an inevitable return to court for the plaintiff, then none of the purposes of exhaustion is satisfied and the Court prudently has excused exhaustion. Especially where the remedy sought is not available, as is the case here, the Court ought not to begin to require exhaustion of administrative remedies.

CONCLUSION

In the context of Social Security, education for children with disabilities, and many other forms of public benefits, individuals who challenge the legality of administrative regulations and policies should not be required to exhaust the normal administrative review process, especially when nowhere within the review process can any adjudicator provide the appropriate relief. Requiring exhaustion of useless procedures would be contrary to the purposes of administrative exhaustion principles, and would be inconsistent with this Court's longstanding precedents holding that potential litigants are not required to pursue unavailable administrative remedies. Thus, there is a compelling justification to retain a "futility" exception to the general administrative exhaustion requirements, whether imposed by statute or common law principles.

For the reasons set forth in the Petitioner's Brief and above, this Court should hold that Congress did not intend to prohibit waiver of the administrative exhaustion requirement in the 42 U.S.C. § 1997e(a) under all circumstances and should accordingly reverse the decision of the Court of Appeals in this case.

Respectfully submitted,



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IN THE

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER; SERGEANT WORKENSHER; LIEUTENANT RIKUS; and CAPTAIN GARDENER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER, SUGGESTING REVERSAL

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INTEREST OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK[1]

The Association of the Bar of the City of New York ("the Association") was formed in 1870. Its more than 21,000 members are dedicated to the promotion of ethical standards and civic duty and to political, legal, and social reform in the local, state, national, and international arenas. Through its more than 180 committees, the Association strives to serve the bar and the public in shaping public policy and law reform. On the national level, the Association regularly addresses issues facing Congress and the Executive Branch and submits *amicus* briefs in the federal courts.

The Association has a special interest in assuring legal redress for underserved segments of society, including the civil rights of prisoners, and the removal of obstacles that prevent prisoners from obtaining judicial remedies for legitimate, non-frivolous claims. Over the years, the Association has produced numerous reports and recommendations regarding the constitutional rights of inmates in prisons and jails and the efficient and effective means of resolving inmate disputes when they arise.

The issues in this case affect the rights of incarcerated persons in New York and throughout this country and the development of civil rights jurisprudence in our courts. Through its committees, the Association has broad familiarity

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1. Pursuant to Supreme Court Rule 37.6, *amicus* states that attorney members of the Association authored this brief and that no one other than *amicus* or its members made any financial contribution to the preparation or submission of the brief.

with prisons and jails in New York and elsewhere and the mechanisms that do and do not exist for settling inmate complaints without litigation.

Consistent with its goal of advancing public policy and in the hope of decreasing the human suffering caused by unconstitutional conditions in our nation's correctional facilities, the Association submits this brief. The written consent of all parties of record is filed herewith.

SUMMARY OF ARGUMENT

The Association joins Petitioner in asking the Court to reverse *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000). In that decision, the Third Circuit held that under 42 U.S.C. § 1997e(a), a prisoner who seeks only money damages in federal court must first exhaust prison administrative remedies even though those remedies do not include money damages.

The Association submits this brief to inform the Court of important policy reasons why it should reverse this decision. First, a ruling by this Court that the exhaustion requirement of 42 U.S.C. § 1997e(a) does not apply to cases such as this will encourage states to provide meaningful money-damages relief in their prisons' administrative grievance procedures. For example, in New York, the legislature has authorized the prison system to award up to $5,000 in money damages for wrongs done to prisoners by state employees. But prison authorities have thus far refused to implement this authority to establish a grievance system that provides such compensation.

Second, the exhaustion requirement imposes upon a prisoner an unnecessary risk of retaliation from prison staff angry that the prisoner has complained against one of their number. The risk is unnecessary because even if a prisoner files a grievance, he or she will receive no relief from a prison system that does not provide compensation. It is one thing to require a prisoner to go through an empty but harmless formality, quite another to require a formality that may put him or her in danger. That is to say, the Association believes an exhaustion requirement makes sense when the prison grievance system at issue is capable of providing meaningful relief. The exhaustion requirement should therefore be interpreted in such a way as to encourage states to establish such meaningful relief.

These issues have long been important to the Association, and it therefore focuses on these points here and leaves to petitioner and other *amici* the bulk of the arguments addressing statutory construction, legislative history, and the like.

ARGUMENT

> *"Who rang that bell?"* snapped the gatekeeper to the Emerald City in response to Dorothy's pulling the bell cord just before he slammed the door shut. *"Can't you read the notice?"*: **BELL OUT OF ORDER, PLEASE KNOCK**. *"Well, that's more like it,"* he retorted when she knocked, *"Now state your business."*
>
> **The Wizard of Oz**
> Metro-Goldwyn-Mayer (1939)

The satirization of the foibles of twentieth century bureaucracy in L. Frank Baum's timeless fairytale would remain lighthearted were it not for the odyssey facing prisoners attempting to navigate the Prison Litigation Reform Act's labyrinth in order to obtain an audience with the Court. For those seeking only money damages from their custodians, exhaustion of administrative remedies after enactment of the Prison Litigation Reform Act ("PLRA") under the guise that they are "available" is far more than just a pointless bureaucratic exercise. It can jeopardize their welfare, their health, and sometimes even their lives.

THE PRISON LITIGATION REFORM ACT DOES NOT REQUIRE INMATES SEEKING ONLY DAMAGES TO EXHAUST ADMINISTRATIVE REMEDIES THAT ARE NOT AVAILABLE.

The PLRA's exhaustion requirement represents, in effect, a passing of the baton to corrections officials . . . [who] now have the opportunity to

> play the role for which they have clamored — resolving problems in correctional operations and conditions of confinement that would otherwise wind up on a judge's desk.[2]

This Court should rule that the exhaustion requirement of 42 U.S.C. § 1997e(a) does not apply to cases such as this in order to encourage New York and other states to provide meaningful money-damages remedies in their prisons' grievance systems.

In fact, New York's legislature has already empowered its prison system, as with any department or agency, to establish a system of money damages for prison grievances. The State Comptroller can, without litigation, pay "any claim . . . for injuries to personal property, real property, or for personal injuries caused by the tort of an officer or employee of the state while acting as such officer or employee" upon certification "by the head of the department or agency having supervision of such officer or employee" up to $5,000. State Finance Law, § 8(12-a) (McKinney 2000).[3]

Despite this authority, New York prison authorities do not provide money damages through their grievance system

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2. Lynn S. Branham, "The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What it Means and What Congress, Courts, and Correctional Officials Can Learn from It," 86 Cornell L. Rev. 101, 140 n.10 (2001) (in press) ("Branham" hereafter).

3. Under existing law claims exceeding $5,000 cannot be resolved administratively but must proceed in the New York State Court of Claims.

to prisoners injured by personal injury, other torts, or constitutional violations.[4] Rather, prison policy authorizes compensation for personal property claims, such as lost or destroyed possessions[5] or for what are essentially back wages for wrongful disciplinary confinement.[6]

Thus, in New York when a prisoner seeks monetary compensation for an injury that has been completed and is not ongoing, there are no administrative remedies to exhaust. As Justice Harlan stated in his concurrence in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971), in reference to an analogous situation, it is "damages or nothing." Moreover, this is not just a problem in New York. Professor Branham's exhaustive study of inmate grievance systems revealed that *none* of the forty-five state correction departments surveyed provided in their grievance systems for actual damages for tort-type claims, although some corrections departments maintain they offer some type of alternative non-monetary relief.[7]

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4. *See Lee v. Artuz*, 2000 WL 231083 at *3 (S.D.N.Y. 2000) (defendants admit "that monetary damages are unavailable in the administrative grievance procedures established by 7 N.Y.C.R.R. § 701"); *see also* Stipulation in *Rowe & Myers v. Lilly*, 99 Civ. 4317 (JSM) (S.D.N.Y. 2000) ("there has never been a grievance in which an inmate seeking money damages for personal injuries has been resolved by the payment of money").

5. New York Department of Correctional Services Directive No. 2733, "Inmate Personal Property Claim" (1998).

6. New York Department of Correctional Services Directive No. 4802, "Inmate Payroll Standards," Section III-C-4-d (1995).

7. Branham, *supra* Note 2, at 127-28.

Worse, prison authorities in New York argue in case after case that federal courts should dismiss inmate claims that are solely for money damages on the grounds that those inmates must first seek compensation in a prison administrative system that withholds any monetary compensation.[8] Affirmance here would foster continuance of a cynical set of circumstances in which a state refuses to make available a legal state administrative remedy and then seeks dismissal of federal cases on the ground that inmates who file lawsuits did not ask for it. The Court should not ratify state agencies' decisions to ignore their own laws, nor should it remit inmates to exhaustion of remedies that are made useless by the state's own actions or are statutorily barred. If the Court takes a more positive course of action and reverses the Third Circuit decision, it will encourage states to provide money damages in their prison grievance systems. This will reduce unnecessary litigation and advance what the Association believes to be Congress' intent behind the PLRA: to give prison and jail officials the first chance to correct their own mistakes.

This salutary principle, that prison administrative procedures reduce litigation and give prison authorities a first crack at solving their own problems, dates at least to the

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8. *Rowe v. Lilly*, 2000 WL 1677710 (S.D.N.Y. 2000); *Cuoco v. United States Bureau of Prisons*, 2000 WL 347155 (S.D.N.Y.); *Petit v. Bender*, 2000 WL 303280 (S.D.N.Y. 2000); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312-13 (S.D.N.Y. 2000); *Lee v. Artuz*, 2000 WL 231083 (S.D.N.Y. 2000); *Royster v. United States*, 91 F. Supp. 2d 626, 628 (S.D.N.Y. 2000); *Santiago v. Meinsen*, 89 F. Supp. 2d 435, 440 (S.D.N.Y. 2000); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 892-96 (S.D.N.Y. 1998); *but see Polite v. Barvarin*, 1998 WL 146687 (S.D.N.Y. 1998) (rejecting dismissal).

aftermath of the Attica uprising in western New York in 1971. The McKay Commission, appointed to investigate the causes of the uprising, concluded that a major contributor to inmate tension was the lack of procedures to resolve inmate complaints in a non-violent manner. Robert B. McKay, Attica: The Official Report of the New York State Special Commission on Attica (1972). New York's prison grievance procedure therefore was enacted as "an alternative to burdening the courts with matters which can and should be resolved administratively" and a way to "place the responsibility where it ought to be" by giving the Department an "opportunity to correct [a department procedure or practice] before the grievance is referred for outside review." Memorandum of State Executive Department, McKinney's Session Laws of N.Y., 1975, pp. 1705-1706.

This principle applies equally to money damages: a prison system that systematically denies compensation for injuries to its inmates fosters tension, distrust, and animosity, along with, of course, federal litigation. A system that provides such money damages can, at least in some cases, reduce both prisoner animosity and the number of lawsuits. It is notable that Pennsylvania, following the incidents giving rise to this lawsuit, modified its grievance procedures to allow for damages.

But if correction departments choose to drop the baton by refusing to provide for damages in appropriate cases to injured inmates, the Court should not excuse their failure. As the Fifth Circuit noted in its review of PLRA exhaustion in damages cases: "[T]here is nothing to prevent . . . enacting regulations that would permit the recovery of monetary relief." *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998).

A critical lesson of Attica is that a meaningful grievance system can head off trouble before it happens. This lesson cannot fairly be extended to justify a grievance system that does not provide meaningful remedies. Yet in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), the case upon which the decision below rests, the Third Circuit tries to do just that. It states that even where the grievance system does not provide for money damages, it may nevertheless lead to "something of a cooperative ethos . . . between inmate and jailer." *Id.* at 76. The Court envisions a system in which inmates who file grievances are rewarded with "a letter of apology, transfer to a more favorable cell block, or disciplining the prison official who wronged the inmate. . . ." *Id.* at 77. As the Third Circuit recognized, this scenario will not occur unless prison officials take seriously the grievance procedure. *Id.*

In New York, prison officials do not always do so. First, as noted above, prison authorities in New York have declined to implement their legislative authority to provide money damages. Second, it has been the experience of the lawyer-members of the Association who regularly represent inmates that an inmate who files a grievance can sometimes expect to be rewarded with retaliation and abuse rather than a letter of apology. Prisons and jails are "total institutions" that, by design and in practice, are removed from the community and operated to emphasize their separation from all aspects of the outside world, including the oversight protection of the courts, in most of their day-to-day activities.[9] The notion that

9. *See* Andrew C. Twaddle, "Utilization of Medical Services by a Captive Population: An Analysis of Sick Call in a State Prison," 17 J. of Health & Soc. Beh. 236, 237 (1976); *see also* Erving Goffman, Asylums at 4 (1961); *Ingraham v. Wright*, 431 U.S. 651, 669-70 (1977). The peculiarities of the status of prisoner-patients (Cont'd)

one has a right to complain to the government without retaliation, which unincarcerated individuals in varying degrees take for granted, is often absent in corrections.

This experience is borne out in the cases. The findings of judges and juries reflect a persistent pattern of prison staff retaliation against inmates. For example, in *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994), the plaintiff was a leader of the prison Muslim community and also an inmate grievance representative aiding other inmates who had complaints. The court found that he had been transferred *nine* times and put into segregation (solitary confinement) *four* times in retaliation for his activities. *Id.* at 1102. *See also Goff v. Burton*, 91 F.3d 1188 (8th Cir. 1996) (court found prison staff unlawfully retaliated against inmate by transferring him to segregated confinement); *Meriwether*, 879 F.2d 1037 at 1040, 1046 (2d Cir. 1989) (prisoners transferred for being "outspoken critics of administration" and "corresponding with state officials and public interest organizations about the problems" at the prison); *Alnutt v. Cleary*, 27 F. Supp. 2d 295, 397 (W.D.N.Y. 1998) (false disciplinary charges, assault and faked positive drug test in retaliation for First Amendment exercise).

Indeed, this Court has recognized, that even outside prison, government officials may retaliate against citizens for lawfully exercising their rights. *See Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

(Cont'd)
in custody and concern over past abuses has resulted in federal restrictions on using prisoners as subjects in behavioral and biomedical research. *See* 21 C.F.R. §§ 50.40-.48 (1987); 28 C.F.R. §§ 512.10-.22 (1987); 45 C.F.R. §§ 46.301-.306 (1985).

In the correctional setting, given the enormous imbalance of power between the keepers and the kept, the risk is not only greater, but pervasive.

The Association recognizes that Section 1997e(a) requires that prisoners exhaust claims that are not for money damages and that these claims also have the potential to lead to retaliation. But in the case of inmates required to exhaust their claims for money damages in a prison grievance procedure such as New York's, the inmates must run this risk of retaliation *without any possible benefit*, since the grievance system will not provide what they seek: compensation for their injuries. Prisoners have "everything to lose and nothing to gain" from useless administrative exhaustion of damages claims. *See McCarthy v. Madigan*, 503 U.S. 140, 152 (1992). Such a set-up contradicts the principal lesson of Attica: to provide grievance remedies that are meaningful enough to give some satisfaction to the inmates who file them.

The case under review illustrates this point. Mr. Booth alleges *four* separate, escalating, and retaliatory episodes of excessive and brutal use of force. To argue that he should (or must) have brought this matter before institutional authorities, who would almost certainly have conveyed the complaint to the officers involved, is to ignore the reality of the setting in which Mr. Booth found himself.

In *Nyhuis*, the Third Circuit described prison as a benign environment in which disagreements between inmates and officers can be resolved amicably. This view is not without foundation, and many prison officials are dedicated to the safety and well being of the prisoners under their control. Nevertheless, there are sufficient instances of abuse,

intimidation and neglect of prisoners by staff to make inmates think twice about filing a grievance, particularly when they know they stand nothing to gain. New York has seen several particularly brutal cases in recent years that deserve mention in this regard.

Maurice Mathie was a detainee at a Long Island jail who was repeatedly stalked by a male sergeant in charge of facility security who made sexual advances toward him over his objections, culminating in the sergeant's handcuffing Mathie to pipes and anally raping him. *Mathie v. Fries*, 121 F.3d 808, 810-11 (2d Cir. 1997). The district court found that the security chief "used his position . . . to victimize and forcibly sodomize an inmate under his total control in an outrageous abuse of power and authority." 935 F. Supp. 1284, 1306 (S.D.N.Y. 1996), *aff'd*, 121 F.3d 808 (2d Cir. 1997).

In *Blissett v. Coughlin*, 66 F.3d 531, 537 (2d Cir. 1995), the plaintiff was kicked and beaten by correctional officers and then confined naked in a feces-smeared cell. In *Williams v. United States*, 747 F. Supp. 967, 971-82 (S.D.N.Y. 1990), a diabetic inmate repeatedly sought medical care for an infected foot. Eventually, gangrene set in. By the time doctors treated him, all they could do was amputate his leg below the knee. The court awarded substantial damages, as it did in the cases of Mathie and Blissett.

The Association cites these cases to demonstrate that for *some* prisoners at least, prison staff can be sufficiently negligent or abusive to deter their filing a grievance. When that grievance cannot provide the relief sought, the inmate might reasonably decide to drop the issue entirely, even though he could have prevailed in court.

Thus, applying the exhaustion requirement to require prisoners to seek non-existent remedies could in effect return prison jurisprudence to the discredited "hands-off" doctrine of thirty years ago, that the acts of prison officials are beyond judicial review.[10] The Association urges the Court not to take that step.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case for further proceedings.

Respectfully submitted,

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10. *See* Note, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Hear the Complaints of Convicts," 72 Yale L.J. 506, 520-24 (1963); *but see Thornberg v. Abbott*, 490 U.S. 401, 407 (1989) ("[p]rison walls do not form a barrier separating inmates from the protections of the Constitution").